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No. 92-

In the Supreme Court of the United States of America

October Term, 1992

BOBBY WHITWORTH, Individually and in his official capacity as Commissioner of the Department of Corrections of the State of Georgia, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of the Department of Corrections of the State of Georgia, DAVID C. EVANS, Individually, and GEORGIA POWER COMPANY,

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION
and
FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION OF GEORGIA POWER COMPANY FOR WRIT OF CERTIORARI

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Dated: June 26, 1992

QUESTION PRESENTED

Whether under 42 U.S.C. § 1983 a bidder who has not been awarded a state contract has a constitutionally protected property interest in that contract sufficient to allow it to seek substantive judicial review of the state's decision not to select it to provide such services?

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PETITION OF GEORGIA POWER COMPANY FOR WRIT OF CERTIORARI

Petitioner Georgia Power Company (hereinafter referred to as "Georgia Power")[1], respectfully prays that a writ of certiorari issue to review the judgment and opin-

[1] All parties to the proceedings below are identified in the caption of this petition. *See* Supreme Court Rule 14(b). The parent

ion of the United States Court of Appeals for the Eleventh Circuit in *Pataula Electric Membership Corp. v. Whitworth,* 951 F.2d 1238, *reh'g denied*, 959 F.2d 974 (11th Cir. 1992) (hereinafter referred to as "*Pataula*").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, issued on January 29, 1992, is published at 951 F.2d 1238, and reprinted in the Appendix hereto at pages 1a-12a. The United States Court of Appeals for the Eleventh Circuit denied Petitioner Georgia Power's Motion for Rehearing by Order dated March 31, 1992, 959 F.2d 974, which is reprinted in the Appendix hereto at pages 13a-14a. The decisions of the United States District Court for the Northern District of Georgia from which Respondents appealed to the Eleventh Circuit issued on November 20, 1990 and January 15, 1991 and have not been reported. They are reprinted in the Appendix hereto at pages 21a-30a and 31a-32a respectively.[2]

JURISDICTION

Respondents invoked federal jurisdiction under 42 U.S.C. § 1983 in their respective Complaints originally filed on July 16, 1990 and July 30, 1990. Each Respondent amended its Complaint on September 7, 1990. On November 20, 1990, the United States District Court for the Northern District of Georgia consolidated the two cases

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company of Petitioner Georgia Power is The Southern Company. *See* Supreme Court Rule 29.1.

[2] Hereinafter all references to the Appendix will be cited as "App. at __ a".

and by written order granted Petitioners' Motions to Dismiss Respondents' Amended Complaints. [App. at 21a-30a]. Reconsideration was denied by the District Court on January 15, 1991. [App. at 31a-32a].

Respondents appealed from the final order of the District Court pursuant to 28 U.S.C. § 1291 to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit on January 29, 1992 entered a judgment and opinion reversing the District Court's Order dismissing Respondents' Amended Complaints. *Pataula*, 951 F.2d 1238 [App. at 1a-12a]. Rehearing was denied by the Eleventh Circuit on March 31, 1992. *Patula*, 959 F.2d 974 [App. at 13a-14a]. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) which grants power to review all cases in the courts of appeals.

STATUTES AND OTHER PROVISIONS INVOLVED

The statutes and other provisions involved in this case are set forth verbatim in the Appendix as follows:

Civil Action for Deprivation of Rights, 42 U.S.C. § 1983;

Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1, *et seq.* (Michie 1982 & Supp. 1991);

Georgia State Purchasing Act, O.C.G.A. §§ 50-5-50, *et seq.* (Michie 1990 & Supp. 1991) (selected relevant sections);

State of Georgia Vendor Manual (selected relevant sections);

Georgia Department of Administrative Services Purchasing and Surplus Property Division Agency Purchasing Manual (selected relevant sections).

STATEMENT OF THE CASE

This dispute arises from the State of Georgia Department of Corrections' (hereinafter referred to as "D.O.C.") selection of electric suppliers to serve two new state prisons: (1) Pataula Electric Membership Corporation (hereinafter referred to as "Pataula EMC") and Georgia Power submitted proposals to the D.O.C. to provide electric service to a new prison facility located in Calhoun County, Georgia; and (2) Flint Electric Membership Corporation (hereinafter referred to as "Flint EMC") and Georgia Power submitted proposals to the D.O.C. to provide electric service to a new prison in Macon County, Georgia. The prisons are located outside of municipalities and are large enough to qualify as "large load" premises under the Georgia Territorial Electric Service Act (hereinafter referred to as the "Territorial Act"), O.C.G.A. § 46-3-8(a)(5) (Michie 1982 & Supp. 1991) [App. at 48a].[3] The proposals submitted by the electric suppliers were analyzed by a consultant which made recommendations to the D.O.C. [See Exhibit A to Amended Complaint of Flint EMC (App. at 147a); Exhibit A to Amended Complaint of Pataula EMC (App. at 174a)]. Upon consideration, the D.O.C. accepted Georgia Power's electric service proposals to serve each prison. [Amended Complaint of Flint EMC, ¶ 16 (App. at 139a); Amended Complaint of Pataula EMC ¶ 17 (App. at 167a)]. The choice of an electric supplier in Georgia is a life-of-the-premises decision. O.C.G.A. § 46-3-8(b)

[3] Most premises located in the State of Georgia are assigned an electric supplier by virtue of their location. Pursuant to O.C.G.A. § 46-3-8(a)(5) (Michie 1982 & Supp. 1991) [App. at 48a], a new premises with a connection load at initial full operation in excess of 900 kilowatts may choose any electric supplier in the State of Georgia if the premises is located outside a municipality.

(Michie 1982 & Supp. 1991) [App. at 48a]. Thus, once lawfully served by an electric supplier, the new prisons always will be served by the same electric supplier.

Respondents' Amended Complaints allege that State officials, specifically Bobby Whitworth, Clyde Stovall, and David Evans (hereinafter referred to as the "State Defendants"), arbitrarily failed to award electric service contracts to the "lowest responsible bidder." The Amended Complaints allege that the State Defendants were obligated to award electric service contracts to the lowest responsible bidder and that each Respondent was the lowest responsible bidder for each electric service contract. Respondents further allege that, as lowest responsible bidders, they had protected property interests under Georgia law. [Amended Complaint of Flint EMC, Count One (App. at 141a-143a); Amended Complaint of Pataula EMC, Count One (App. at 168a-170a)]. Respondents do not allege that bids were sought pursuant to, or submitted in accordance with the Georgia State Purchasing Act O.C.G.A. §§ 50-5-50, *et seq.* (Michie 1990 & 1991 Supp.) (hereinafter referred to as the "Purchasing Act") or other state procurement regulations.

Respondents have alleged that, by accepting Georgia Power's proposal for electric service, the State Defendants violated Respondents' right to due process and thereby violated 42 U.S.C. § 1983. As remedies, Respondents each requested that the District Court (1) issue a preliminary and permanent injunction enjoining performance of the Georgia Power electric service contracts; (2) rescind the Georgia Power electric service contracts; (3) award Respondents the electric service contracts; (4) award damages and attorneys' fees against the State Defendants. [Amended Complaint of Flint EMC (App. at

145a); Amended Complaint of Pataula EMC (App. at 172a)].

The District Court for the Northern District of Georgia, Judge Horace T. Ward, consolidated the two actions and dismissed Respondents' Amended Complaints, holding that "plaintiffs have failed to meet their burden of showing that they possess property interests or entitlements granted by state law. Plaintiffs cannot sustain an action under 42 U.S.C.A. § 1983." [Order of the Court dated November 20, 1990 (App. at 29a)]. In reaching this decision, the District Court accepted as true all of Respondents' factual allegations and applied the standards of Federal Rule of Civil Procedure 12(b)(6) to evaluate the sufficiency of the allegations of the Amended Complaints. [App. at 24a]. The court evaluated Respondents' claims on the basis that, "a constitutionally protected property interest exists if acknowledged by applicable state law. To state a cause of action, a disappointed bidder must have been entitled to award of the project under the applicable state law." [App. at 25a]. The court dismissed the Amended Complaints because Respondents could not show that they were entitled to the electric service contracts, and thus had no property interest protected under 42 U.S.C. § 1983. [App. at 29a]. Further, the District Court reviewed the applicable statutes and regulations and ruled that the D.O.C. "was not mandated by law to seek competitive bids for electric service." *Id.* On January 15, 1991, the court denied reconsideration of its previous decision stating that, "Plaintiffs have failed to show a legitimate claim of entitlement under the State Purchasing Act and procurement regulations." [App. at 32a].

By opinion dated January 29, 1992, the United States Court of Appeals for the Eleventh Circuit reversed the

District Court and found that "plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements." *Pataula,* 951 F.2d at 1243 [App. at 11a]. The Eleventh Circuit further found that the State Defendants' "discretion to choose the lowest responsible bidder . . . does not preclude plaintiffs' claim to a constitutionally protected property interest in the award of utility contracts." *Id.* at 1244.

REASONS FOR GRANTING THE WRIT

Respondents allege they would have been selected to provide electric service for the two new prisons but for the arbitrary and capricious actions of state officials. They seek substantive judicial review in federal court through 42 U.S.C. § 1983, on the basis that they had a protected property interest in the contracts they desired. However, in light of this Court's precedents, Respondents did not, and could not, have a property interest in the desired state contracts, because they were mere applicants for government benefits and did not already possess such benefits.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court inaugurated the modern procedural due process revolution that guarantees some kind of process for those relying upon established government benefits. In that case, the Court found that a welfare recipient's interest in continued receipt of welfare was a "statutory entitlement" that amounted to "property" within the meaning of the due process clause. *Goldberg,* 397 U.S. at 262 n.8, 263. Soon thereafter, the standard for finding a legally protected property interest was developed in *Board of Regents v. Roth,* 408 U.S. 564 (1972), wherein the Court held

that a person possesses a protected property interest in a government benefit if the government mandates that the person is *entitled* to the benefit. *Id.* at 577. In *Roth* the Court applied traditional notions of property to protect the reliance by members of society on benefits provided by the government — benefits, which if arbitrarily withdrawn, would result in severe hardship. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.*

By relying upon established attributes of property, the Court in *Roth* necessarily was providing a boundary for the range of interests that the Fourteenth Amendment protects. While modern legal theory recognizes property interests beyond items such as chattels or land, *see, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972) (change in status of parolee); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver licenses), the interests or benefits which can be considered property still have to take on the traditional characteristics of property, such as possession. The Court made this clear in *Roth* by its focus on the reliance interest people have in property: "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in *specific* benefits." 408 U.S. at 576 (emphasis added).

Unlike the case in *Roth*, Respondents have never relied upon acquired benefits because they were never chosen as the exclusive life-of-the-premises electric suppliers for the two new state prisons. Nonetheless, Respondents argue that they should have been awarded the contracts because they were the "lowest responsible bidder" and therefore they have an entitlement to be the

exclusive electric supplier sufficient to invoke judicial review pursuant to 42 U.S.C. § 1983.[4]

In the twenty years since *Roth*, this Court has applied its principles in many contexts, but it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fourth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986). The situation involved here, a Section 1983 challenge by an unsuccessful applicant or bidder for a state contract, is one which has not previously been addressed by this Court and is one as to which there is a great deal of confusion in the lower federal courts. *Compare Peterson Enterprises, Inc. v. Ohio Dept. of Mental Retardation and Developmental Disabilities, No. 89-3347 (6th Cir. November 29, 1989) (LEXIS, Genfed library, App. file); Curtis Ambulance of Florida, Inc. v. Board of County Commissioners*, 811 F.2d 1371 (10th Cir. 1987);

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[4] In their Amended Complaints, Respondents allege that as "lowest responsible bidders" they are entitled to the relief they seek as a result of the provisions of the Purchasing Act, O.C.G.A. §§ 50-5-50, *et seq.* (Michie 1990 & Supp. 1991) [App. at 61a-79a] and Georgia's purchasing regulations and procedures, including the Georgia Vendor Manual promulgated by the Georgia Department of Administrative Services (hereinafter referred to as "DOAS") [App. at 80a-111a] and the DOAS Agency Purchasing Manual. [App. at 112a-128a]. Petitioner Georgia Power contends that, as a matter of law, the selection of a supplier to provide electric service to a facility for the life of the premises is not a procurement but an administrative choice governed solely by the Territorial Act. However, even should the choice of an electric supplier by considered to be a procurement subject to the Purchasing Act, the provisions and policies of the Territorial Act must nevertheless be considered when assessing whether an electric supplier can reasonably form an expectation of entitlement to be selected to provide such services.

Sowell's Meats & Services, Inc. v. McSwain, 788 F.2d 226, 228 (4th Cir. 1986) (the majority rule bars "an unsuccessful bidder from bringing an action against public contracting officials"); *Coyne-Delany Co. v. Capital Development Board*, 616 F.2d 341, 342 (7th Cir. 1980) ("The rationale of *Board of Regents v. Roth* [citation omitted] is, in our opinion, inapplicable to the procurement situation . . . ."); *ARA Services, Inc. v. School District*, 590 F. Supp 622 (E.D. Pa. 1984); *City of Atlanta v. Ashland-Warren, Inc.*, No. C81-106A (N.D. Ga. Aug. 20, 1981) (LEXIS, Genfed library, Dist. file); *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F. Supp. 625 (E.D. Pa. 1980); *Estey Corp. v. Matzke*, 431 F. Supp. 468 (N.D. Ill. 1976) (all doubting the existence of a property interest by a bidder for a government contract or other benefit) *with L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981); *Kendrick v. City Council of Augusta*, 516 F. Supp. 1134 (S.D. Ga. 1981); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980) (all recognizing the possibility that such a property interest can exist).[5]

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[5] In an analogous context, the Court denied review of a Ninth Circuit decision finding that applicants for welfare benefits, as opposed to those already receiving such benefits, could claim a protected property interest. *See Peer v. Griffeth*, 603 F.2d 118 (3th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980). In his dissent to the denial of certiorari, Chief Justice Rehnquist, although acknowledging that "this Court cannot parse every state-law provision to determine whether it creates a protected 'property interest'," noted the significant distinction between loss or termination of already acquired benefits and benefits sought to be acquired. 445 U.S. at 970. As observed by Chief Justice Rehnquist, the Court had not in 1980 (and still has not in 1992) directly addressed the issue of whether

The Eleventh Circuit's decision in the case below is a significant intrusion by the federal judiciary into state and local government procurement. Countless political subdivisions in this country are subject to lowest responsible bidder procurement requirements. Under the Eleventh Circuit's decision, unsuccessful bidders who allege that governmental officials were arbitrary and capricious in denying them contracts can obtain substantive judicial review of the procurement decision. This unwarranted intrusion into state affairs by the federal courts exceeds the bounds of 42 U.S.C. § 1983.

I.

A GOVERNMENT CONTRACT BIDDER'S INTEREST IN THE AWARD OF A CONTRACT IS INHERENTLY INCHOATE.

In order for a *Roth* entitlement to arise, a person must have "already acquired" "specific benefits." *Roth*, 408 U.S. at 576. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of utility service); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (termination of employment); *Morrissey*, 408 U.S. 471 (change in status of parolee); *Bell*, 402 U.S. 535 (termination of driver's license); *Goldberg*, 397 U.S. 254 (already acquired welfare benefit had been terminated). In the present case, however, there has been no extension of a government benefit to either Respondent.

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applicants for government benefits have a protected property interest. *Id.*

A. Respondents Have Not "Already Acquired" Government Benefits Because The Contracts Were Never Awarded To Them.

The status of Respondents can be characterized, at best, as applicants for government benefits. The distinction between applicants for benefits, as opposed to those who have already acquired benefits, is a critical one, as recognized by Chief Justice Rehnquist in his dissent to denial of certiorari in *Peer v. Griffeth,* 445 U.S. 970 (1980). (See footnote 5 *supra* at page 10). *See also Lyng v. Payne,* 476 U.S. 926, 942 (1986).[6] Illustrative is *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), in which the Court distinguished between the situation where a person had been granted parole and that benefit had been revoked and the situation, as was before the Court in that case, where the person was attempting to obtain parole. At the stage of attempting to obtain parole, no benefit had yet been conferred upon the person. *Greenholtz,* 442 U.S. at 10-11. The Court found that while the state statute in question created the possibility of obtaining parole based on certain factors, a mere possibility of obtaining a government benefit could not rise to the level of an entitlement. *Id.* at 11.

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[6] This same distinction was recognized by the Supreme Court of Georgia in *City of Atlanta v. J.A. Jones Construction Co.,* 260 Ga. 658, 398 S.E.2d 369 (1990). There, the Georgia Supreme Court recognized that frustrated bidders do not have a reliance interest in contracts they desire and, accordingly, bidders can recoup only bid preparation costs, but not lost profits or lost economic value of the contract. 260 Ga. at 659, 398 S.E.2d at 371. In so holding, the court stated: "To permit the recovery of lost profits would unduly punish the tax paying public while compensating the plaintiffs for effort they did not make and risks they did not take." *Id.*

In the case at bar, Respondents were not awarded or promised the contracts for which they submitted proposals. As such, they did not acquire a property interest of which they could be deprived within the meaning of the Fourteenth Amendment.

B. The Nature Of The Bidding Process Belies Respondents' Contentions That They Have Property Interests In The Contracts Awarded To Petitioner Georgia Power.

In actuality, the status of each Respondent does not even rise to the level of an applicant for a government benefit. The nature of the competitive process employed by the D.O.C refutes Respondents' contentions that they have protected property interests in the D.O.C.'s choice of electric suppliers. Respondents were not just applying for a government benefit; they were competing against others for that benefit. At the bidding stage, there is no guarantee that one entity will get the contract. Perhaps another entity will be the low bidder; perhaps another entity will offer a more reasonable bid; or, perhaps the state determines not to award the contract at all. These factors are "unknowns," and given this uncertainty, a bidder cannot be assured that it will be awarded a contract. Accordingly, even if a state official's discretion is limited, as found by the court below, *Pataula,* 951 F.2d at 1243 [App. at 9a], no entitlement can arise in the competitive process until the contract is awarded. In *Pataula* the Eleventh Circuit did not address this competitive nature of the bidding process. Rather, it focused only upon whether the D.O.C.'s discretion was sufficiently limited.

Even if this case was to turn on the discretion afforded the D.O.C. officials, however, this Court has determined that the presence of criteria which are in-

tended to guide state officials' decisions do not presumptively create an entitlement. Thus, in *Hewitt v. Helms,* 459 U.S. 460, 471 (1983), the Court cautioned against lightly finding that procedural guidelines give rise to entitlements, stating that "[i]t would be ironic to hold that when a State embarks on such desirable experimentation, it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." *See Greenholtz,* 441 U.S. at 10 (The decision to grant parole involved "subtle" factors and "an amalgam of elements, some of which are factual but many of which are purely subjective appraisals."). *See also O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 795 (1980) (Blackmun, J., concurring) ("This Court has never held that *any* substantive restriction upon removal of *any* governmental benefit gives rise to a generalized property interest in its continued enjoyment.") (emphasis in original). Despite this precedent, the Eleventh Circuit, without any analysis of the competitive process, found that the presence of criteria to guide State officials was sufficient to give rise to an entitlement. *See Pataula,* 951 F.2d at 1242-43 [App. at 9a].

In the case at bar, the "lowest responsible bidder" statute which Respondents assert provides a property interest, O.C.G.A. § 50-5-67(b) (Michie 1990 & 1991 Supp.) [App. at 71a], like the statute in *Greenholtz,* involves criteria that require significant subjective appraisals. The Georgia Attorney General recognized this when interpreting this statute's nearly identical predecessor:

> This section clearly vests considerable discretion in the department to consider factors other than price, and, in fact, *directs* it to con-

> sider these factors. The Supreme Court of this state has held that the courts should not interfere in the exercise of such discretionary power unless it is manifestly abused. *J.C. Lewis Motor Co., Inc. v. Mayor & Council of Savannah,* 210 Ga. 591 (1984).

74 Op. Ga. Att'y Gen. 16(1974), at 29 (emphasis in original) [App. at 132a]. How can the few words the Georgia legislators penned meaningfully constrain State officials who purchase a vast array of products and services (from pencils to machines, to buildings, to parcels of land, to electric services), such that any one supplier should expect to be awarded a particular contract? The fact is that while Georgia obviously wants to prevent the State from making purchases from insiders or friends of State officials, it has not mandated other certain purchasers. State officials must procure products in the best interests of the State, and in so doing, they must exercise considerable discretion, especially when seeking to fulfill a vital State need such as utility service to a State prison. The government necessarily must rely to a considerable extent on the judgment of its officials in the procurement of goods and services.

Further, the subjective analysis and evaluation in the selection of a utility to provide electric services is magnified because the Territorial Act provides that selection can be made only one time for the life of the premises. *See* O.C.G.A. § 46-3-8(b) (Michie 1982 & Supp. 1991) [App. at 48a]. As such, when selecting electric suppliers, officials of Georgia must look into the future and make their best guess as to whether the selection made today will be in the best interests of the State tomorrow. This necessarily involves an analysis of "subtle" factors and "an amalgam of elements, some of which are factual but many

of which are purely subjective appraisals." *Greenholtz,* 441 U.S. at 10.[7] By affording Respondents a Section 1983 remedy, a reviewing court improperly substitutes its judgment for the judgment of the state procurement officials.

The Court has been extremely reluctant to allow such substituted judgment. For instance, in *Regents of the University of Michigan v. Ewing,* 474 U.S. 214 (1985), Ewing alleged that he had a property interest in continued enrollment in a University program, and that his dismissal from school was arbitrary and capricious. Ewing further alleged that the dismissal violated his substantive due process rights guaranteed by the Fourteenth Amendment, providing the basis for his claim under 42 U.S.C. § 1983. The Court noted that since Ewing received sufficient process, his claim was that the University misjudged his fitness to remain a student. *Ewing,* 474 U.S. at 225. The Court, however, declined to evaluate the actions of the University, finding that the judiciary was not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.' " *Ewing,* 474 U.S. at 226 (quoting *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78, 89-90 (1978)). *See also Bishop v. Wood,* 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the

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[7] For example, in the case at bar, the considerations of the D.O.C. went far beyond the current "cost per kilowatt." The D.O.C. necessarily focused upon the method of service, outage history and maintenance capabilities of the suppliers. [Exhibit A to Amended Complaint of Flint EMC (App. at 147a); Exhibit A to Amended Complaint of Pataula EMC (App. at 174a)].

multitude of personnel decisions that are made daily by public agencies.").

In summary, not only did Respondents never acquire property which they claim was taken away arbitrarily, but their unreasonable unilateral expectation is not sufficient to give rise to an entitlement in the context of a competitive selection process. Respondents focus on the existence of a Georgia statute and regulations that require in many cases that state purchases be awarded to the lowest responsible bidder, but they divorce this statute from the competitive process such a procurement scheme puts in place.[8] If an evaluation of the Georgia procurement scheme is necessary, then the provisions of the statute must be analyzed to determine the actual effect on the decisionmaking of Georgia officials. It is one thing for the State to prevent purchases from insiders; but that is a far cry from mandating certain purchases. The latter is, however, what Respondents argue in this case by maintaining that they are entitled to State contracts.

II.

THE DOCTRINE OF SUBSTANTIVE DUE PROCESS DOES NOT PROTECT PERSONS FROM ALL ARBITRARY STATE ACTION.

In response to Petitioners' assertion that D.O.C. officials had the discretion to reject any and all bids, the Eleventh Circuit stated that "the power to reject 'any and all bids' [pursuant to O.C.G.A. § 50-5-67(b)] did not

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[8] This "lowest responsible bidder" system of procurement is typical of state and local government procurement procedures throughout the nation, as is illustrated by the growing legion of federal cases seeking to sort out when a property interest is created. (See, *e.g.*, cases cited at pages 9-10 *supra.)*

empower the defendants to act in an arbitrary manner." *Pataula*, 951 F.2d at 1243 (citing *Konigsberg v. State Bar*, 358 U.S. 252, 273 (1957)) [App. at 11a]. In so ruling, the Eleventh Circuit afforded substantive due process rights to losing bidders, specifically stating that:

> At a minimum, then, plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements. *See Metric Constructors, Inc.*, 729 F.Supp. at 102. The DOC defendants' discretion to choose the lowest responsible bidder thus does not preclude plaintiffs' claim to a constitutionally protected property interest in the award of utility contracts.

Pataula, 951 F.2d at 1243 [App. at 11a].

The Eleventh Circuit's *Pataula* decision is without support in this Court's previous decisions, and conflicts with a First Circuit decision that this Court recently let stand on appeal by denying review. *See PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, ____ U.S. ____, 112 S. Ct. 1151 (1992). Like the present case, *PFZ Properties* involved the alleged arbitrary denial of a government benefit to an "applicant." In *PFZ Properties*, a real estate developer alleged a Section 1983 cause of action on the basis that a state agency had arbitrarily denied it a construction permit. The First Circuit's discussion of the substantive due process claims in the case merits statement in full:

> In addition to its procedural due process claim, PFZ alleges that ARPE violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved

construction drawings. This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. *See, e.g., Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 42-43 (1st Cir.), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 765 (1987); *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983); *Creative Environments*, 680 F.2d at 829-30. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. *See Chiplin Enterprises*, 712 F.2d at 1528. The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'government power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.' " *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted). *See Pittsley v. Warish*, 927 F.2d 3 (1st Cir. 1991); *see also Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (applying a "rational basis" test to government action challenged under a substantive due process theory). PFZ's allegations concerning ARPE's treatment of its proposal simply do not make out a

> substantive due process violation under this standard.

PFZ Properties, 928 F.2d at 31-32.

This Court has established that the first inquiry in any Section 1983 suit must be whether the plaintiff was deprived of a right secured by the Constitution and laws, an inquiry that was made by the First Circuit in *PFZ Properties*. In *Baker v. McCollan*, 443 U.S. 138, 140 (1979) the Court acknowledged that the respondent, McCollan, had been deprived of his liberty, but the issue in substantive due process analysis is whether the deprivation rises to a constitutional violation. The Court found that a false imprisonment of three days does not and could not amount to such a violation. *Baker*, 443 U.S. at 145. In the case *sub judice*, the Eleventh Circuit made no evaluation as to whether the alleged deprivation of property amounted to a constitutional violation. In ruling that Respondents made out a substantive due process claim by alleging that state officials did not follow state law, the Eleventh Circuit exceeded the parameters of constitutional doctrine established by this Court.

CONCLUSION

The actions of state and local governments affect citizens in many ways, but every interest or relationship a person has with such governments is not subject to scrutiny in the federal courts and is not subject to the strictures of the Due Process Clause. For Section 1983 to be used as a vehicle for invoking the Due Process Clause, a person must possess, that is, have "already acquired" property that was deprived without adequate process. *See Roth*, 408 U.S. at 576. The Court in the early 1970's extended the protection of property afforded under the

Constitution to government benefits already possessed by persons, such as driver licenses or welfare benefits, because the benefits took on traditional attributes of property, such as possession. In this case, however, Respondents never came to possess or acquire the government benefit they desired, *i.e.,* to be selected as exclusive life-of-the-premises electric suppliers for State facilities. Therefore they have no property interest in these contracts.

The competitive selection process involved in this case also belies Respondents' contentions that they possess an entitlement to be the State of Georgia's suppliers of electricity to the facilities in question. Moreover, while Georgia officials must award certain contracts to the lowest responsible bidder, this requirement inherently provides a great deal of discretion in order to determine responsiveness to the State's needs.

The Court's precedents, such as *Roth,* should not be extended so that a class of plaintiffs such as Respondents can use 42 U.S.C. § 1983 as a vehicle to seek substantive federal judicial review of state government procurement decisions. The dispute these Georgia utilities have with the State of Georgia does not implicate nor necessitate the supervision of the federal courts or the protection of the Due Process Clause of the United States Constitution, particularly since Respondents are not discrete and insular minorities but are private commercial entities. *See O'Bannon,* 447 U.S. at 800 n.8. (Blackmun, J., concurring).

If the Eleventh Circuit opinion below is left to stand, federal court involvement in the affairs of state government will increase dramatically, at a time when the lower federal courts generally are looking to this Court to limit

federal court involvement in state contracting. *See, e.g., Patterson v. Portch,* 853 F.2d 1399, 1405 (7th Cir. 1988) (Posner, J.) ("The continued appropriateness of using federal courts to resolve run-of-the mine contract disputes between public employees and their employers may deserve fresh consideration by the Supreme Court, but at our level the issue is foreclosed."). Because countless political subdivisions are subject to "lowest responsible bidder" statutes, the federal courts, at least in the Eleventh Circuit, will now be in the business of reviewing the purchasing decisions of the state and municipal governments.

For these reasons, Petitioner Georgia Power Company respectfully requests that the Supreme Court accept certiorari in this case.

Respectfully submitted,

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Dated: June 26, 1992

No. 92-

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1992

BOBBY WHITWORTH, Individually and in his official capacity as Commissioner of the Department of Corrections of the State of Georgia, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of the Department of Corrections of the State of Georgia, DAVID C. EVANS, Individually, and GEORGIA POWER COMPANY,

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION and FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CERTIFICATE OF SERVICE

I, Ralph H. Greil, a member of the Bar of this Court, hereby certify that on this 26th day of June, 1992, three copies of the Petition of Georgia Power Company for Writ of Certiorari and Appendix thereto in the above-entitled case were served upon counsel of record by depositing same in the United States Mail, properly addressed and with adequate postage thereon to:

James A. Orr, Esquire, Paul, Hastings, Janofsky & Walker, 42nd Floor — Georgia Pacific Center, 133 Peachtree Street, N.E., Atlanta, Georgia 30303, (404) 588-9900, counsel for Respondents Pataula EMC and Flint EMC, and to William F. Amideo, Esquire, The Department of Law, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, (404) 656-3355, counsel of record for Petitioners Whitworth, Stovall, and Evans. I further certify that all parties required to be served have been served.

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92-2081

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No. 92-

In the Supreme Court of the United States of America

October Term, 1992

GEORGIA POWER COMPANY,

Petitioner,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION
and
FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION OF GEORGIA POWER COMPANY FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8098

PATAULA ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff-Appellant,

versus

Bobby WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, GEORGIA POWER COMPANY,

Defendants-Appellees,

FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff-Appellant,

versus

Bobby WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, GEORGIA POWER COMPANY,

Defendants-Appellees.

January 29, 1992

January 29, 1992
Appeal from the United States District Court for the Northern District of Georgia

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Before JOHNSON*, and CLARK*, and PECK**, Senior Circuit Judges.

JOHNSON, Senior Circuit Judge:

This case arises on appeal following the district court's dismissal of plaintiffs' complaints for failure to demonstrate a constitutionally protected property interest in the award of utility contracts. For the reasons that follow, we reverse the order of dismissal.

I. STATEMENT OF THE CASE

In April of 1989, Pataula Electric Membership Corporation (Pataula EMC) and Georgia Power Company (Georgia Power) submitted bids to the Department of Corrections (DOC) for the provision of electric service to a new prison in Calhoun County, Georgia. A consultant for the DOC analyzed the proposals and recommended Pataula EMC on the basis of probable savings in cost.

This same consultant assessed bids from Flint Electric Membership Corporation (Flint EMC) and Georgia Power for service to a Macon County prison in 1990. The consultant recommended Flint EMC on the basis of its projected lower costs. Nonetheless, the DOC chose Georgia Power to service both of the prisons.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

In July of 1990, the Pataula EMC and Flint EMC (plaintiffs) filed separate suits challenging the DOC's refusal to award the contracts to the "lowest responsible bidders." On November 21, 1990, these cases were consolidated and dismissed for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). The district court held that the plaintiffs could not demonstrate that they were entitled to the service contracts, and thus that they had no property interest protected under section 1983 of title 42.

This Court reviews *de novo* the district court's dismissal of plaintiffs' complaints for failure to state a claim. *See Thomas v. Evans,* 880 F.2d 1235, 1239 (11th Cir.1989). Dismissal of a complaint for failure to state a claim is error " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Powell v. United States,* 945 F.2d.374, 375-76 (11th Cir.1991)).

II. DISCUSSION

Plaintiffs argue on appeal that under Georgia law they possess a constitutionally protected property interest in the contracts. They also contend that the DOC defendants are not entitled to qualified immunity.

A. Property Interest in the Contracts

Defendants advance three arguments for plaintiffs' lack of a property interest in the contracts: (1) Georgia statutes and regulations do not require electric utility contracts to be awarded to the lowest responsible bidder,

(2) Georgia law expresses no intent to grant an entitlement to the lowest responsible bidder, and (3) applicable statutes and regulations grant procurers discretion sufficient to prevent bidders from forming a property interest.

1. Lowest responsible bidder requirement

One of the express purposes of Georgia's State Purchasing Act (Act) is to "ensure openness and accessibility by all qualified vendors to the state's purchasing processes so as to achieve the lowest possible costs to the state through effective competition among such vendors." Ga. Code Ann. § 50-5-50(3) (Michie 1990). The Act designates the Department of Administrative Services (DOAS) as the state agency that must oversee competitive bidding for purchases for the state and its agencies. *Id.* at § 50-5-51(1). The Act requires the DOAS to use competitive bidding to purchase or acquire "all supplies, materials, services other than professional and personal employment services" for use by the state or its agencies. *Id.* The only exemptions from this competitive bidding requirement are express exemptions for professional and personal employment services, *id.* at § 50-5-51(1), and purchases below a stated dollar amount, *id.* at § 50-5-69.

Defendants contend that section 50-5-51(3) separately provides the DOAS with the authority to contract for services or to delegate contracting of services including electric utilities.[1] Because this provision does not

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[1] Section 50-5-51(3) states that the DOAS shall have the authority "[t]o contract for all telephones, telegraph, electric light power, postal, and any and all other contractual purchases and needs of the state government or any of its departments . . . or in lieu of such contract to authorize any department, institution, or agency to purchase or contract for any or all such services."

include a competitive bidding requirement, defendants argue that electric utility service is impliedly exempt from the bidding requirement stated in section 50-5-51(1). Section 50-5-51(1), however, simply lists all items subject to competitive bidding, whereas section 50-5-51(3) lists items which the DOAS may contract for directly on behalf of the state or its agencies, or may authorize state agencies to contract for independently.[2]

The Georgia Vendor Manual (Manual), promulgated by the DOAS to interpret and implement the terms and provisions of the State Purchasing Act, provides further support for this construction: "Contracts or open market purchases will in all cases be awarded to the lowest responsible bidder." Ga. Dept. of Admin. Services, Ga. Vendor Manual, art. VIII, § 3, at 23; *see also id.* at art. II, § 4, p. 5 (all procurements by state agencies under Purchasing Act "will be based on competitive bidding whenever possible."). These broad bidding requirements encompass electric utility contracts.

Defendants argue that the Agency Purchasing Manual (APM), which also reviews procedure for state purchases, nonetheless relieves state agencies from using competitive bidding for utility contracts. *See* Ga. Dept. of Admin. Services, Agency Purchasing Manual (revised

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[2] Under defendants' characterization of the purpose of section 50-5-50(3), competitive bidding requirements would also not apply to "any and all other contractual purchases and needs." Such an interpretation would wholly circumvent the competitive bidding instruction in section 50-5-51(1).

Section 50-5-58(a) likewise does not release the state from using the competitive bidding process mandated by section 50-5-51(1). Section 50-5-58(a) merely allows state agencies to purchase directly certain items without specific authorization from the DOAS. *See* Ga. Code Ann. § 50-5-58(a) (Michie 1990).

Oct. 6, 1987). In the APM, utilities are listed as items subject to "audited authority," thereby permitting an agency procurement officer, instead of the DOAS, to purchase utilities for a specific agency. *Id.* at 7, 9, 74. Utilities are among many items marked with a "#" symbol, which denotes that "competitive bids are not expected or may be very difficult to obtain due to the nature of the item, purchasing circumstances, market situation or other restrictive conditions." *Id.* at 69. Although the Manual explicitly assigns the competitive bidding requirement to purchases made according to audited authority, *see* Ga. Dept. of Admin. Services, Ga. Vendor Manual, art. IV, § 3, at 10, defendants contend, and the district court concluded, that the "#" symbol exempts selected items from competitive bidding.

This interpretation of the "#" symbol is deeply flawed. The APM simply recognizes the fact that competitive bidding may not be possible for the designated items in certain circumstances.[3] The APM does not attempt to exempt these items from competitive bidding when such bidding is possible. Indeed, it cannot: neither the DOAS nor its commissioner is empowered by any statutory section to determine what items will be exempt from competitive bidding requirements; therefore, neither may promulgate rules or regulations to accomplish this result. *See* Ga. Code Ann. §§ 50-5-54, 50-5-55 (Michie 1990). Where, as in this case, there is no impediment to competi-

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[3] For example, competitive bidding for electrical service contracts is not a legal possibility except under the narrowly prescribed conditions of the Georgia Territorial Electric Service Act. *See* Ga. Code Ann. §§ 46-3-1 to 46-3-15 (Michie 1982 & Supp.1991). In most cases, the electric supplier for the assigned area would be the only supplier statutorily permitted to provide electric service in a particular locality.

tive bidding, the State Purchasing Act and relevant rules mandate competitive bidding. *See id.* at § 50-5-51(1); Ga. Dept. of Admin. Services, Ga. Vendor Manual, art. II, § 4, at 5 (competitive bidding required "whenever possible"); Ga. Dept. of Admin. Services, Agency Purchasing Manual (revised Oct. 6, 1987), at 117, 118 (agency procurement officer required to obtain competitive prices "whenever possible" for service/maintenance contracts subject to audited authority).

2. Entitlement for lowest responsible bidder

Defendants argue that although utility contracts may be subject to competitive bidding, Georgia does not recognize that a lowest responsible bidder may have a property interest in the award of a contract.[4] We disagree.

A disappointed bidder may have a constitutionally protected property interest in the award of a contract under 42 U.S.C.A. § 1983 (1981) if that interest is acknowledged by "existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *see also Metric Constructors, Inc. v. Gwinnett County, Ga.,* 729 F.Supp. 101 (N.D.Ga.1990). The directive contained in the Manual represents a rule or understanding sufficient to create an entitlement: "[c]ontracts or open-market purchases will in all cases be awarded to the lowest responsible bidder."

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[4] Defendants argue that because procurement regulations inure to the benefit of taxpayers, disappointed bidders can have no property interest under Georgia law. The decisions cited to support this argument, however, have limited only the recovery of lost profits. *See, e.g., Amdahl Corp. v. Ga. Dept. of Admin. Services,* 260 Ga. 690, 398 S.E.2d 540, 546 (1990) (equitable relief available).

Ga. Dept. of Admin. Services, Vendor Manual, art. VIII, § 3, at 23; *see also, e.g., Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157, 161 (1980) (lowest responsible bidder's property interest was defined by the competitive bidding procedures promulgated by the State Board of Education).

3. Discretion of Georgia state procurers

Defendants argue that even if Georgia requires a contract to be awarded to the "lowest responsible bidder," determining the lowest responsible bidder involves discretion sufficiently broad to preclude a bidder from forming an expectation of an award. Defendants assert that because plaintiffs at most formed a unilateral expectation of the award of the contracts, plaintiffs cannot claim an entitlement to them.[5]

The Vendor Manual provided objective standards for the DOC to determine the "lowest responsible bidder":

> The lowest responsible bidder is deemed to be that bidder who submits a responsive bid which meets the specifications set out in the Invitation to Bid and which is most advantageous to the State, taking into account price, performance,

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[5] Defendants alternatively argue that a bidder's interest is inherently inchoate and does not arise to the level of an entitlement until an award of a contract is in hand. The discussion in the preceding section, however, demonstrates that state statutes or rules may create an entitlement for the lowest responsible bidder. Defendants' reliance on *Cunningham v. Adams*, 808 F.2d 815 (11th Cir. 1987), is misplaced. *Cunningham* simply stands for the proposition that a committee's recommendation of a contractor to the deciding Board did not represent a selection, and thus did not obligate the Board to choose plaintiff. *Id.* at 820-21.

> and capacity to perform of the bidder; quality of the merchandise offered; transportation charges; and date of delivery.

Ga. Dept. of Admin. Services, Ga. Vendor Manual, art. VIII, § 3, at 23. These objective standards confine discretion sufficiently to allow formation of a property interest.[6] It is sufficient that the decisionmaker must declare a bidder to be the "lowest responsible bidder" after determining that the bidder, in the decisionmaker's judgment, meets the necessary prerequisites.[7] *See Board of Pardons v. Allen,* 482 U.S. 369, 373-76, 107 S.Ct. 2415, 2418-19, 96 L.Ed.2d 303 (1987). The fact that the decisionmaker must exercise judgment in applying these standards "is not incompatible with the existence of a [constitutionally protected] interest." *Id.* at 376, 107 S.Ct. at 2419.

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[6] The defendants incorrectly compare the procurers' discretion in this case to the broader discretion of officials who are not limited by any lowest responsible bidding requirement. *See, e.g., Perkins v. Lukens Steel Co.,* 310 U.S. 113, 126-29, 60 S.Ct. 869, 876-77, 84 L.Ed. 1108 (1940) (government required only to advertise before awarding contracts and then to provide that contractors meet certain labor standards); *Sowell's Meats & Services, Inc. v. McSwain,* 788 F.2d 226, 228-29 (4th Cir.1986) (statute requires contracts to be awarded to "responsible contractors" after consideration of several noninclusive factors).

[7] The defendants mistakenly rely on parole board cases to demonstrate that the authority to exercise discretion is inconsistent with the existence of a constitutionally protected interest. These cases analyze a prisoner's entitlement to a liberty interest pursuant to statutes *permitting* parole upon a subjective determination by the parole board, but not requiring release after consideration of an objective set of standards. *See, e.g., Francis v. Fox,* 838 F.2d 1147 (11th Cir.1988); *Thomas v. Sellers,* 691 F.2d 487 (11th Cir.1982).

The degree of discretion enjoyed by the DOC in choosing the lowest responsible bidder falls squarely within the compass of discretion that the Georgia Supreme Court has found insufficient to preclude bidders from forming an expectation of an award. *See Amdahl Corp. v. Dept. of Admin.*, 260 Ga. 690, 398 S.E.2d 540 (1990); *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980). The Georgia Supreme Court has held that a rejected low bidder has a property interest even if the procurement agency has "some discretion" regarding the final award. *Amdahl Corp.*, 398 S.E.2d at 545; *see also Hilton Const. Co.*, 266 S.E.2d at 161. Although the relevant guidelines in *Amdahl* granted less discretion to the procurers than in the instant case, the *Amdahl* court did not define an upper acceptable limit in discretion. *Amdahl*, 398 S.E.2d at 545 (DOAS was bound to choose bidder with lowest price-performance formula). In *Hilton Construction Co.*, the Board was vested with greater discretion than in the present case. The *Hilton* Board was required to choose the "responsible bidder submitting the lowest acceptable bid." *Hilton Constr. Co.*, 266 S.E.2d at 161. Unlike the DOC in the instant case, the *Hilton* Board was provided no guidelines either for assessing a "responsible" bidder or for determining an "acceptable bid." *Id.*

Defendants counter that the purchasing agent's authority to reject "any and all bids" allows the agent to reject the lowest responsible bidder, and thus grants the agent very broad discretion. *See* Ga. Code Ann. § 50-5-67(b) (Michie Supp.1991). Assuming *arguendo*

that section 50-5-67(b) is relevant to the instant case,[8] the power to reject "any and all bids" did not empower the defendants to act in an arbitrary manner. *See Konigsberg v. State Bar,* 353 U.S. 252, 273, 77 S.Ct. 722, 733, 1 L.Ed.2d 810 (1957) (state is free to select its own members of legal bar, but state cannot exercise its power in arbitrary or discriminatory manner). At a minimum, then, plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements.[9] *See Metric Constructors, Inc.,* 729 F.Supp. at 102. The DOC defendants' discretion to choose the lowest responsible bidder thus does not preclude plaintiffs' claim to a constitutionally protected property interest in the award of utility contracts.

B. Qualified Immunity Unavailable

The DOC defendants claim qualified immunity. They argue that the complaint must be dismissed because

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[8] Defendants have also argued that section 50-5-67(b), which includes a competitive bidding requirement, has no application to utility contracts because it makes no reference to "services." Section 50-5-67(b) refers only to "contracts for the purchases of supplies, materials, or equipment." Ga.Code Ann. § 50-5-67(b) (Michie Supp.1991).

[9] Defendants' reliance on *City of Atlanta v. Ashland Warren, Inc.,* 1982-1 Trade Cas. (CCH) ¶ 64,527, 1981 WL 2187 (N.D.Ga.1981), is misplaced. In this case, the low bidder did not meet the terms of the City's bid requirements. The court held only that the government, in the absence of mandatory guidelines for choosing contracts, may set the terms for acceptable contracts. The court did not find that the government may choose contractors regardless of the established terms.

plaintiffs cannot demonstrate that the DOC violated clearly established statutory or constitutional rights. *See Waldrop v. Evans,* 871 F.2d 1030, 1033 (11th Cir.1989). The actions of the DOC in this regard are evaluated under a reasonable person standard. *Id.*

The relevant statutes and rules clearly mandate that procurers award contracts to the lowest responsible bidder whenever possible. Because the Georgia Supreme Court has long recognized a constitutionally protected property interest in the award of a contract under competitive bidding statutes and rules, the DOC officials knew or should have known that they deprived plaintiffs — as lowest responsible bidders — of a property interest by ignoring statutory and regulatory directives. *See id.* at 1036. The DOC defendants' claim of qualified immunity must therefore fail.

III. CONCLUSION

For the reasons set forth above, we REVERSE the district court's order to dismiss for failure to state a claim and REMAND to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8098

PATAULA ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff-Appellant,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, GEORGIA POWER COMPANY,

Defendants-Appellees.

FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff-Appellant,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually GEORGIA POWER COMPANY,

Defendants-Appellees.

Appeal from the United States District Court of the Northern District of Georgia

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ON PETITION(S) FOR REHEARING

BEFORE: JOHNSON*, CLARK*, and PECK**, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellee, GEORGIA POWER COMPANY, is denied.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

[Filed March 31, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8098

PATAULA ELECTRIC MEMBERSHIP CORPORATION and FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiffs-Appellants,

versus

BOBBY WHITWORTH, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

BEFORE: JOHNSON*, CLARK*, and PECK**, Senior Circuit Judges.

PER CURIAM:

☑ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

☐ The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

[Filed March 31, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8098

PATAULA ELECTRIC MEMBERSHIP,

Plaintiff-Appellant,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, GEORGIA POWER COMPANY,

Defendants-Appellees.

FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff-Appellant,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually GEORGIA POWER COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ORDER:

Appellees' joint motion for an extension of time in which to file motion for stay of mandate to and including April 14, 1992, is granted.

MIGUEL J. CORTEZ, Clerk
United States Court of Appeals
for the Eleventh Circuit

/s/ Kembra L. Smith
Kembra L. Smith, Deputy Clerk

ENTERED FOR THE COURT —
BY DIRECTION

[Filed April 10, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8098

PATAULA ELECTRIC MEMBERSHIP,

Plaintiff-Appellant,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, GEORGIA POWER COMPANY,

Defendants-Appellees.

FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff-Appellant,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, GEORGIA POWER COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ORDER:

☐ The motion of Appellee, Georgia Power for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

☑ The motion of Appellee, Georgia Power for (XX) stay ( ) of the mandate pending petition for writ of certiorari is GRANTED to and including June 29, 1992, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____, for a further stay of the issuance of the mandate is GRANTED to and including _____ under the same conditions as set forth in the preceding paragraph.

☐ IT IS ORDERED that the motion of _____, for a further stay of the issuance of the mandate is DENIED.

/s/ Frank M. Johnson
United States Circuit Judge

[Filed April 28, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:90-cv-1550-HTW

FLINT ELECTRIC MEMBERSHIP CORPORATION,
Plaintiffs,

versus

BOBBY WHITWORTH, individually, and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, individually, and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, individually, and GEORGIA POWER COMPANY,
Defendants.

CIVIL ACTION
1:90-cv-1675-JOF

PATAULA ELECTRIC MEMBERSHIP CORPORATION,
Plaintiffs,

versus

BOBBY WHITWORTH, individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, individually, and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, individually, and GEORGIA POWER COMPANY,
Defendants.

ORDER OF COURT

These cases are pending on motions to dismiss, motions to consolidate, and motions for a protective order filed by defendants Georgia Power Company, Bobby Whitworth, and Clyde Stovall.

MOTION TO CONSOLIDATE FOR PRETRIAL PROCEEDINGS

Defendant Georgia Power Co. has moved for consolidation of these cases for pretrial proceedings. The plaintiffs do not oppose consolidation for pretrial proceedings. Inasmuch as it appears that the litigation at the pretrial level will revolve around similar facts and legal issues, the court considers good cause shown.

The motion for consolidation for pretrial proceedings is GRANTED. It is ORDERED that these cases be consolidated up to, but not including, the required filing of pretrial orders.

MOTIONS TO DISMISS

These cases concern the rights of disappointed bidders to obtain judicial relief from a determination by the Georgia Department of Corrections to designate Georgia Power as electrical service provider for prisons to be constructed and operated in Calhoun County and Macon County, Georgia.

The plaintiffs allege that the designation of such a supplier is controlled by Georgia's procurement statutes which require competitive bidding. Each plaintiff contends that it was the lowest responsible bidder, and therefore its constitutional and statutory rights have been violated by the arbitrary designation of Georgia Power as

electrical service provider. The defendants contend that plaintiffs' complaints are legally insufficient and move to dismiss.

A. Background Facts

Plaintiffs Flint Electric Membership Corporation ("Flint EMC") and Pataula Electric Membership Corporation ("Pataula EMC") are nonprofit electric cooperatives organized and existing under the Georgia Electric Membership Corporation Act.

On or about April 10, 1989, Pataula EMC submitted a bid for the provision of electric service to [a] new prison to be constructed in Calhoun County, Georgia. On or about March 1, 1990, Flint EMC submitted a bid to the Department of Corrections for the provision of electrical service to a new prison to be constructed in Macon County, Georgia. Georgia Power Company also submitted bids to provide electric service to the prisons.

As a part of its process of evaluating the proposals submitted by the bidders, the Department of Corrections asked consulting Engineers Rosser Fabrap International ("Rosser Fabrap") to review the proposals from the parties. After reviewing the proposals for the prison in Macon County, Rosser Fabrap recommended Flint EMC because of its lower operating costs and superior service. After reviewing the proposals for the prison in Calhoun County, Rosser Fabrap recommended Pataula EMC because of its lower operating costs and lower lease costs.

The plaintiffs allege that, notwithstanding the fact that the plaintiffs were the lowest responsible bidders on the respective projects, defendants Stovall and Whitworth arbitrarily decided to award the contract for electric service to Georgia Power. Flint EMC alleges that

defendants Stovall and Whitworth failed to communicate certain criteria subsequently relied upon by them in making the decision to award the contract. Flint EMC further alleges that Stovall and Whitworth informed Flint EMC that at lease [sic] one factor relied upon would not be a consideration in the determination and that Stovall and Whitworth utilized at least one statement from Georgia Power that was made improperly and outside the bidding process and that Stovall and Whitworth disregarded the consultant's recommendation.

Plaintiff Pataula EMC alleges that the defendants Stovall and Whitworth relied on invalid and unsupported assumptions, criteria predesigned to favor Georgia Power, criteria not reasonably related to the provision of electric service and arbitrary considerations in granting Georgia Power the contract for electrical service.

In their complaints, plaintiffs seek injunctive relief and damages for the violation of their due process rights.

B. Legal Standard

For purposes of a motion to dismiss, pursuant to F.R.Civ.P. 12(b)(6), the complaint is construed in the light most favorable to plaintiff and its material allegations are taken as true. When a federal court reviews the sufficiency of a complaint, the issue is not whether plaintiff will ultimately prevail or is likely to prevail but whether the plaintiff is entitled to offer evidence to support the claims. *Scheuer v. Rhodes,* 416 U.S. 232 (1974). The motion addresses itself solely to the failure of the complaint to state a claim for relief. *See,* Wright & Miller *Federal Practice and Procedure,* § 1357. In appraising the sufficiency of plaintiff's complaint, this court follows the settled rule that plaintiff's complaint should not be dis-

missed for failure to state a claim unless it appears beyond doubt that she can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson,* 355 U.S. 41 at 45-56 (1957).

C. Discussion

A complaint under 42 U.S.C. § 1983 must allege the existence of a liberty or property interest that has been abridged under color of state law without adequate due process. *See Board of Regents v. Roth,* 408 U.S. 564, 569-70 (1972). To establish a property interest, plaintiff must have a legitimate claim of entitlement as determined by reference to state law. *Id.* at 577; *Bishop v. Wood,* 426 U.S. 341, 344 (1976).

In evaluating plaintiffs' complaint, the court is guided by the decision of Judge Shoob in *Metric Constructors, Inc., v. Gwinnett County,* 729 F. Supp. 101 (N.D.Ga. 1990), in which he addressed the conflicting authority concerning the rights of a disappointed bidder to obtain judicial relief.

Judge Shoob determined that a constitutionally protected property interest exists if acknowledged by applicable state law. To state a cause of action, a disappointed bidder must have been entitled to award of the project under the applicable state law. In this latter regard, the appropriate consideration is not whether the successful bidder complied with bidding procedures, but rather, whether *the property interest arises from the expectations of the plaintiffs and the entitlement granted by state law. Id.* 729 F. Supp. at 102[1] (emphasis added). Judge Shoob also

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[1] Citing, *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.,* 585 F.Supp. 120, 124 (E.D.Ark. 1984), *aff'd,* 769 F.2d 517 (8th Cir.

determined, and the court agrees that, under Georgia law a constitutionally protected property interest may be possessed by a disappointed bidder for a contract with the state. *Metric Constructors,* 729 F. Supp. at 102. *Hilton Construction Co. v. Board of Education,* 245 Ga. 533 (1980)[2]

The fact that a disappointed bidder may possess a protected property interest under Georgia law does not mean that plaintiffs have stated a cause of action in the present cases. Plaintiffs must demonstrate that they were entitled to award of the contract for electric services under the laws that govern the relevant bidding procedures.

The defendants contend that plaintiffs have no property interest protected by due process because the Georgia Department of Corrections is not required to utilize the competitive bidding process in the designation of an electrical service supplier.

1985); *Teleprompter of Erie, Inc. v. City of Erie,* 567 F.Supp. 1277, 1287-88 (W.D.Pa. 1983).

[2] In *Hilton,* the Georgia Supreme Court held that the low bidder under procedures which required that "the award of the contract will be made to the responsible bidder submitting the lowest acceptable bid" could maintain a cause of action for refusal to award it the contract.

The State Purchasing Act[3] grants the Department of Administrative Services ("DOAS") the authority to purchase

> supplies, materials, services other than professional and personal employment services, and equipment

for state agencies, or to regulate the purchase thereof, under competitive bidding. O.C.G.A. § 50-5-51(1). The State Purchasing Act also provides the DOAS with the authority and duty,

> To contract for all telephones, telegraph, electric light power, postal, and any and all other contractual purchases and needs of the state government or any of its departments, institutions, or agencies; or in lieu of such contract to authorize any department, institution, or agency to purchase or contract for any or all such service.

O.C.G.A. § 50-5-51(3). Since this provision does not include a bidding requirement, the parties dispute whether the DOAS is legislatively required to use competitive bidding in contracting for electrical services as is required for goods and services found in O.C.G.A. § 50-5-51(1).

Pursuant to its authority the DOAS promulgated the Vendor Manual. The Vendor Manual sets forth the procurement regulations of the DOAS under the State Purchasing Act. Under certain circumstances the DOAS is authorized to delegate purchasing authority to any or to all State agencies both for the procurement of certain

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[3] O.C.G.A. § 50-5-50 through § 55-5-81 (Michie 1986 & Supp. 1990).

classes of products and services. *Vendor Manual*, Art. II, Section 2.

Under O.C.G.A. § 50-5-67(b), the relevant state department is to grant the contract for purchases to the lowest bidder meeting the standards set by the department. *See also, Op. Att'y Gen.* No. 74-16 (1974). Any and all bids may be rejected. O.C.G.A. § 50-5-67(b).

In this case, the DOAS delegated the authority to contract for electric light power to the Department of Corrections under the provisions for Audited Purchase Authority. Article IV Section III of the Vendor Manual states,

> The Purchasing and Surplus Property division has delegated to all State Agencies the authority to purchase products classified as perishables or "special items" and has delegated to selected Agencies authority to purchase technical instruments. The authority to purchase these particular items is referred to as "Audited Purchase Authority." These classified items are listed in the State Purchasing Manual and are available to all procurement officers upon request. *The rules for competitive bidding apply to purchases made according to Audited Purchase Authority.* . . .

(emphasis added).

The DOAS has also promulgated the Agency Purchasing Manual to, among other things,

> provide procedures for processing purchases by item under audited agency authority. . . .

Agency Purchasing Manual, p. 74. The Agency Purchasing Manual includes "utilities" with other items for which,

> competitive bids are not expected or may be very difficult to obtain due to the nature of the item, the purchasing circumstances, the market situation, or other restrictive conditions.

Agency Purchasing Manual, p. 69.

The parties dispute whether, under the provisions of the Purchasing Act, contracts for electricity were subject to the bidding requirements of the Act. The court finds the statutory provisions ambiguous. The requirement that rules for competitive bidding apply to purchases made according to Audited Purchase Authority seems to imply that competitive bidding was required. However, the provisions in the Agency Purchasing Manual state that competitive bids on utilities are not expected or may be very difficult to obtain due to its nature, the purchasing circumstances, the market situation, or other restrictive conditions.

Although it is undisputed that the DOC solicited bids, reviewed the bids, and sent the bids to an independent consultant for review and recommendation. The DOC was not mandated by law to seek competitive bids for electric service.

The court has reviewed plaintiffs' complaints and the submissions of the parties and determines that the plaintiffs have failed to meet their burden of showing that they possess property interests or entitlements granted by state law. Plaintiffs cannot sustain an action under 42 U.S.C.A. § 1983.

Accordingly, defendants' motions to dismiss are GRANTED. The motion for protective order is DENIED as MOOT.

SO ORDERED, this 20th day of November, 1990.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

[Filed November 21, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:90-cv-1550-HTW

FLINT ELECTRIC MEMBERSHIP CORPORATION,
Plaintiffs,

versus

BOBBY WHITWORTH, individually, and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, individually, and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, individually, and GEORGIA POWER COMPANY,
Defendants.

CIVIL ACTION
1:90-cv-1675-JOF

PATAULA ELECTRIC MEMBERSHIP CORPORATION,
Plaintiffs,

versus

BOBBY WHITWORTH, individually, and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, individually, and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, individually, and GEORGIA POWER COMPANY,
Defendants.

ORDER OF COURT

These cases are pending on plaintiffs' motion for reconsideration of its most recent order. Upon review, the court determines that its order of November 28, 1990 is a correct statement of the law as to the narrow facts of this case. Plaintiffs have failed to show a legitimate claim of entitlement under the State Purchasing Act and procurement regulations. Therefore, plaintiffs' motion for reconsideration is DENIED.

SO ORDERED, this 15th day of January, 1991.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT
JUDGE

[Filed January 15, 1991]

UNITED STATES CODE
Title 42

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

OFFICIAL CODE OF GEORGIA ANNOTATED
(Michie 1982 & Supp. 1991)
Title 46

ARTICLE 1

GENERATION, DISTRIBUTION, ETC., OF ELECTRICITY GENERALLY

PART 1

ALLOCATION OF TERRITORIAL RIGHTS TO ELECTRIC SUPPLIERS

46-3-1. Short title.

This part shall be known as the "Georgia Territorial Electric Service Act." (Ga. L. 1973, p. 200, § 1.)

46-3-2. Legislative findings and declaration of policy.

The public interest requires, and it is declared to be the policy of the State of Georgia, that, in order (1) to assure the most efficient, economical, and orderly rendering of retail electric service within the state, (2) to inhibit duplication of the lines of electric suppliers, (3) to foster the extension and location of electric supplier lines in the manner most compatible with the preservation and enhancement of the state's physical environment, and (4) to protect and conserve lines lawfully constructed by electric suppliers, it is necessary and appropriate that the state establish and implement a plan whereby every geographic area within the state shall be either assigned to an electric supplier or declared unassigned as to any electric supplier; that, to accomplish such a plan, it is necessary that all electric suppliers within the state be subject to this part; that the commission be delegated power, authority, and jurisdiction with respect to such

plan; and that all electric membership corporations and all municipalities which furnish retail electric service be additionally subject to regulation by the commission in the same manner as provided for regulation of electric light and power companies, except as to the fixing of their rates, charges, and service rules and regulations, it being determined by the General Assembly that such electric membership corporations and municipalities, which by their corporate nature are wholly or substantially controlled by their consumers, should for regulatory purposes be classified differently in certain respects from electric light and power companies. (Ga. L. 1973, p. 200, § 2.)

46-3-3. Definitions.

As used in this part, the term:

(1) "Assigned area" means an enclosed geographic area assigned to only one electric supplier by the commission or by this part, and inside which the assignee electric supplier shall have the exclusive right to extend and continue furnishing service to new premises, except as otherwise provided in this part.

(2) "Electric membership corporation" means a corporation organized under Article 2 of this chapter.

(3) "Electric supplier" means any electric light and power company subject to regulation by the commission, any electric membership corporation furnishing retail service in this state, and any municipality which furnishes such service within this state.

(4) "Line" means any conductor for the distribution or transmission of electricity other than a conductor operating at a potential of 120,000 volts or more. However, a conductor that initially constitutes a line shall not cease being a line if, after March 29, 1973, it is operating at a potential in excess of 120,000 volts.

(5) "Municipality" means:

(A) Any geographically defined political subdivision of this state, other than a county, performing or authorized to perform multiple and substantial municipal functions, specifically including either the function of furnishing retail electric service or the function of granting to electric suppliers street franchise rights for use in furnishing retail electric service;

(B) Any geographically defined political subdivision, or agency thereof, of this state if at any relevant time it lawfully furnishes retail electric service; and

(C) Any political subdivision of any other state which furnishes retail electric service within this state.

(6) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished, provided that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer shall together constitute one premises; provided, however, that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one

premises if the permanent service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; provided, further, that an outdoor security light, or an outdoor sign requiring less than 2200 watts, shall not constitute a premises.

(7) "Primary supplier" within a municipality in existence on March 29, 1973, means, either:

(A) That electric supplier which, on March 29, 1973, is furnishing service to the majority or to a plurality, whichever is the case, of the retail electric meters then inside the corporate limits of the municipality; or

(B) That electric supplier to which the commission has reassigned a geographic area, previously assigned to another electric supplier, located within such municipality as its limits existed on March 29, 1973.

(8) "Secondary supplier" within a municipality in existence on March 29, 1973, means any electric supplier which owns lines on that date within such municipality and which is not a primary supplier.

(9) "Service" means retail electric service and includes temporary or construction service as well as permanent service but excludes wholesale service and sales for resale.

(10) "To own" or "to belong" or the like means, wherever used in reference to lines being used by an electric supplier, to have any proprietary or possessory interest.

(11) "Unassigned area-A" means a geographic area which, between March 29, 1973, and Sept. 1, 1975, was not an assigned area and was not declared to be an unassigned area-B.

(12) "Unassigned area-B" means a geographic area which has not been assigned and which has been declared by the commission to be, or by operation of this part becomes, an unassigned area-B, and inside which an electric supplier shall have the right to extend and thereafter continue furnishing service to new premises locating therein if chosen by the consumer utilizing such premises, provided that an electric supplier whose line, as it exists on March 29, 1973, or as thereafter lawfully constructed to serve new premises pursuant to this part, is at least partially within 500 feet of such new premises shall have the exclusive right to extend and continue furnishing service to such premises if the line of every other electric supplier so existing or so thereafter constructed is at that time wholly more than 500 feet from such premises.

(13) "Wholly new municipality" means a municipality initially coming into existence after March 29, 1973, but not one resulting from the reincorporation of all or any portion of a geographic area theretofore contained in a previously existing municipality or from the merger, consolidation, or any other combination of two or more political subdivisions which are counties or incorporated cities. (Ga. L. 1973, p. 200, § 3; Ga. L. 1982, p. 3, § 46.)

46-3-4. Assignment or declaration as unassigned areas-B of geographic areas outside municipal limits as of March 29, 1973.

After March 29, 1973, and continuing thereafter as rapidly as it is administratively practicable to do so, the commission is authorized and directed to assign to electric suppliers or to declare as unassigned areas-B all geographic areas in this state that were, on March 29, 1973, located outside the corporate limits of any municipality. Such assignments and declarations of unassignment shall be effected by the commission in accordance with the following standards:

(1) Assigned areas shall be described by defined boundaries on maps to be filed with the commission and incorporated by it in its orders. Where deemed necessary or appropriate, the commission may require boundaries to be additionally described by written metes and bounds;

(2) Each geographic area assigned shall be assigned to only one electric supplier, as determined by public convenience and necessity, having primary regard for the location of electric suppliers' lines but having no regard for differences in electric suppliers' retail rates or for the fact that retail consumers are not then being served from such lines;

(3) Each geographic area assigned shall be so assigned that its boundaries enclose land spaces in which the assignee electric supplier owns all or a preponderance of the lines, provided that a geographic area may be so assigned or declared unassigned even though it is completely surrounded by the inner boundaries of another geographic area assigned to an electric supplier. Boundaries will be

located around the perimeter of such land spaces so as to be approximately 1,000 feet from the nearest of the assignee electric supplier's lines so enclosed, provided that if the lines of two or more electric suppliers are closer together than 2,000 feet, the boundary shall be located approximately halfway between them; provided, however, that where compelling factors of public convenience and necessity so require, including the need for using natural and manmade landmarks for boundary references, the location of a boundary may vary somewhat more or somewhat less than such 1,000 foot or halfway distance; provided, further, that such 1,000 foot or halfway distance standards shall not apply to any lines of the assignee electric supplier which extend from inside the assigned area outside such area or to any lines of any other electric supplier which extend from outside the area inside or completely across such area and which do not otherwise occasion assignment or unassignment of land space, the rights and restrictions applying to such other electric supplier's lines inside such area being as provided for in paragraph (4) of this Code section;

(4) A line of an electric supplier which extends into or completely crosses a land space in which another electric supplier owns a preponderance of the lines may nevertheless be considered as the basis for assigning or declaring unassigned land space related thereto; but, unless such line so occasions an assignment or an unassignment, then, from and after the date of the assignment to an electric supplier of the geographic area within which such line is enclosed and based upon the location of both suppliers' lines on that date, the electric supplier owning such

enclosed line shall have the exclusive right to extend and continue furnishing service to all new premises locating at least partially within 500 feet of such line and wholly more than 500 feet from the assignee electric supplier's lines and shall have the right, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new premises locating at least partially within 500 feet of both electric suppliers' lines but shall not otherwise have the right, unless so agreed by the assignee electric supplier and the consumer utilizing such premises, to extend and furnish service to any other premises locating inside such assigned area;

(5) Except where public convenience and necessity require their assignment, the commission shall declare an unassigned areas-B those land spaces which are not assigned to an electric supplier pursuant to any other provision of this part; and

(6) Not inconsistent with Code Section 46-3-8, any electric supplier may apply to the commission for assignment to it of one or more geographic areas or for the commission to declare one or more geographic areas to be unassigned areas-B. (Ga. L. 1973, p. 200, § 4.)

46-3-5. Assignment of geographic areas within municipal limits as of March 29, 1973.

Except as otherwise provided in subsection (a) of Code Section 46-3-8, all geographic areas inside the corporate limits of every municipality, as such limits existed on March 29, 1973, are assigned to the primary supplier, subject to the rights and restrictions applying to electric suppliers owning lines therein, as follows: Based upon the

location of all electric suppliers' lines therein on March 29, 1973, every secondary supplier shall have the exclusive right to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of its line and wholly more than 300 feet from the lines of every other electric supplier; and shall have the right, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of both its lines and the lines of any other electric supplier; but shall not otherwise have the right, unless so agreed by the primary supplier and by any other secondary supplier whose lines are located at least partially within 300 feet thereof and the consumer utilizing such premises, to extend and continue furnishing service to any other premises locating therein, which shall be the exclusive right of the primary supplier or such other secondary supplier, if such be the case. (Ga. L. 1974, p. 200, § 5; Ga. L. 1982, p. 3, § 46.)

46-3-6. Assignment, etc., of geographic areas included within wholly new municipalities after March 29, 1973.

As to geographic areas which, after March 29, 1973, are included within the initial limits of a wholly new municipality, the rights and restrictions applying to electric suppliers shall be as follows:

(1) Any portion of such geographic area then already assigned to an electric supplier shall continue to be so assigned until and unless reassigned by the commission to another electric supplier pursuant to paragraph (1) of subsection (d) of Code Section 46-3-8; and

(2) Any portion of such geographic area which is then unassigned shall continue to be so unassigned until and unless it is assigned by the commission, taking into account the recommendation, if any, of the municipality itself, to an electric supplier pursuant to paragraph (2) of subsection (d) of Code Section 46-3-8. (Ga. L. 1973, p. 200, § 6; Ga. L. 1982, p. 3, § 46.)

46-3-7. Assignment, etc., of geographic areas annexed to municipalities after March 29, 1973.

Whenever, after March 29, 1973, any geographic area is annexed to a municipality including the inclusion of a geographic area in a new municipality formed by the merger, consolidation, or any other combination of a then existing municipality and one or more other geographically defined political subdivisions, if the resulting political subdivision constitutes a municipality as defined in Code Section 46-3-3, such geographic area shall be assigned or assignable or become unassigned, and the rights and restrictions applying to electric suppliers therein shall be as follows:

(1) In so much of such geographic area, if any, as was immediately theretofore within the limits of a municipality as they existed on March 29, 1973, or as they existed on the date on which a wholly new municipality came into existence, and if such annexation is caused by the merger, consolidation, or any other combination of such previously existing municipality and one or more other geographically defined political subdivisions, resulting in a political subdivision which constitutes a municipality as defined in Code Section 46-3-3, the rights and restrictions applying to all electric suppliers therein shall continue

to be governed by Code Section 46-3-5 or 46-3-6, whichever is applicable;

(2) As to such geographic areas other than those provided for in paragraph (1) of this Code section:

(A) So much of such geographic area, if any, as was already assigned to a primary supplier within a municipality which was in existence on March 29, 1973, shall continue to be so assigned, provided that if such annexation is caused by the merger, consolidation, or any other combination of two or more such municipalities having different primary suppliers, such assignments shall continue in favor of such primary suppliers respectively;

(B) If the annexation is to a wholly new municipality, then so much of such geographic area, if any, as was already assigned to an electric supplier then serving as an assignee electric supplier within such municipality shall continue to be so assigned;

(C) If such annexation includes one or more wholly new municipalities or one or more municipalities which were in existence on March 29, 1973, then so much of such geographic area, if any, as was then contiguous to a wholly new municipality and was already assigned to an assignee electric supplier within such wholly new municipality, or which was contiguous to a municipality which was in existence on March 29, 1973, and was already assigned to the primary supplier within such municipality, shall continue to be so assigned;

(D) As to such geographic areas which are annexed by other than merger, consolidation, or other combination of a previously existing municipality and one or more other geographically defined political subdivisions so as to result in a political subdivision which constitutes a municipality as defined in Code Section 46-3-3 but are not provided for in paragraph (1) of this Code section or in subparagraphs (A), (B), and (C) of this paragraph, so much of such geographic area, if any, as was already assigned to any electric supplier shall continue to be so assigned. In the event the primary supplier delivers, not less than 45 nor more than 90 days prior to the effective date of such annexation, written notice of such annexation upon every other electric supplier owning lines within the county or counties in which the annexing municipality is located (or, though not in the same county, within one mile of any portion of such geographic area), such portions of such geographic area as shall not have been already assigned to any other electric supplier shall by operation of this part become assigned to the primary supplier unless, on or before the effective date of such annexation, there is filed with the commission one or more applications by one or more other electric suppliers for the assignment of any portion of such geographic area. If such an application or applications are filed, then, until there is a final determination with respect to such application or applications, the service rights and restrictions applying to electric suppliers in so much of such geographic area as is

the subject matter of the application or applications shall continue as they were immediately prior to the effective date of annexation. In such a proceeding, the commission, acting in accordance with Code Section 46-3-4, may make assignments of all or any portion of such geographic area to one or more applicant electric suppliers. Any portion of such geographic area not so assigned to any other electric supplier shall, effective as of the final determination of such application or applications, be assigned by operation of this part to the primary supplier, provided that if the commission finds and determines upon complaint that such assignment to the primary supplier of any such portion thereof will be grossly inimical to the public interest, it shall designate such portion as an unassigned area-B. In any geographic area assigned by operation of this part pursuant to this subparagraph, every secondary supplier shall have, based upon the location of all secondary suppliers' lines therein on the effective date of the annexation, the exclusive right to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of its line and wholly more than 300 feet from the lines of every other electric supplier; and shall have the right, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of both its lines and the lines of any other electric supplier; but shall not otherwise have the right, unless so agreed by the assignee electric supplier and by any other sec-

ondary supplier whose lines are located at least partially within 300 feet thereof and the consumer utilizing such premises, to extend and continue furnishing service to any other premises locating therein, which shall be the exclusive right of the assignee electric supplier or such other secondary supplier, if such be the case; or

(E) If such geographic area was already an unassigned area-A or an unassigned area-B and was annexed by merger, consolidation or other combination of a previously existing municipality and one or more other geographically defined political subdivisions so as to result in a political subdivision which constitutes a municipality as defined in Code Section 46-3-3, or if such an unassigned area-A or unassigned area-B was otherwise annexed but the notice of annexation required by subparagraph (D) of this paragraph was not given, such geographic area shall, on the effective date of the annexation, become or continue to be, as the case may be, an unassigned area-B until and unless the commission assigns all or any portion thereof to an electric supplier pursuant to paragraph (2) of subsection (d) of Code Section 46-3-8. (Ga. L. 1973, p. 200, § 7; Ga. L. 1982, p. 3, § 46.)

46-3-8. Exceptions, grandfather rights, etc.

(a) Notwithstanding any other provision of this part, but subject to subsections (b) and (c) of this Code section, after March 29, 1973, service to one or more new premises (but if more than one, such premises must be located on the same tract or on contiguous tracts of land), if utilized by one consumer and having single-metered

service and a connected load which, at the time of initial full operation of the premises, is 900 kilowatts or greater (excluding redundant equipment), may be extended and furnished, if chosen by the consumer:

(1) By the primary supplier within a municipality if the premises are located anywhere within the limits of such municipality as they existed on March 29, 1973;

(2) By a secondary supplier within the limits of a municipality as they existed on March 29, 1973, if the premises are located at least partially within 300 feet of the lines of such secondary supplier;

(3) By any electric supplier if the premises are located within the initial corporate limits of a wholly new municipality;

(4) By any electric supplier owning lines in a municipality if the premises are located in a geographic area annexed in any manner to such municipality after March 29, 1973; and

(5) By any electric supplier if the premises are located outside the limits of a municipality.

(b) Notwithstanding any other provision of this part, but subject to subsections (c) and (h) of this Code section, every electric supplier shall have the exclusive right to continue serving any premises lawfully served by it on March 29, 1973, or thereafter lawfully served by it pursuant to this part, including any premises last and previously served by it which before or after March 29, 1973, have become disconnected from service for any reason, and including premises which before or after March 29, 1973, have been destroyed or dismantled and

which are reconstructed after March 29, 1973, in substantial kind on approximately the same site.

(c) Notwithstanding any other provision of this part:

(1) Upon its own complaint or the complaint of any other electric supplier or any other interested party, the commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to find and determine that the service of an electric supplier then serving a premises or exclusively entitled under this part to serve such premises is not adequate or dependable or that such electric supplier's rates, charges, service rules and regulations, or the application thereof unreasonably discriminate in favor of or against the consumer utilizing such premises, or that an electric supplier is in violation of subsection (b) of Code Section 46-3-11. Upon such determination, the commission shall have the authority and jurisdiction to order such electric supplier within a reasonable time to make such improvements as will make its service adequate and dependable, or to order such electric supplier within not less than 30 days to cease employing such discriminatory rates, charges, service rules and regulations, or the application thereof or the practices prohibited by subsection (b) of Code Section 46-3-11 and to substitute in lieu thereof, subject to approval by the commission, rates, charges, service rules and regulations, and practices of application thereof which are not unreasonably discriminatory, or practices in conformity with subsection (b) of Code Section 46-3-11. If the commission finds and deter-

mines in its first consideration of the matter that such electric supplier is unwilling or unable within a reasonable time to make its service adequate and dependable, or is unwilling within 30 days to cease and correct such unreasonable discrimination or practices, or if it finds in a subsequent consideration of the matter that its order to improve service, its order to cease and correct the unreasonable discrimination, or its order to cease and correct such practices has not been timely and in good faith complied with, it may then order such electric supplier to cease or desist from serving such premises and order any other electric supplier which may reasonably do so to extend and furnish service to such premises; and

(2) Upon the joint application of the affected electric suppliers, the commission shall have the authority and jurisdiction, after notice to all affected persons and after hearing, if a hearing is requested, to find and determine that the public convenience and necessity require, and thereupon to approve, the transfer of service from one electric supplier to another electric supplier.

(d) Notwithstanding any other provisions of this part, but subject to subsection (b) of this Code section, the commission may:

(1) If it determines that an assignee electric supplier has breached the tenets of public convenience and necessity therein, reassign all or any portion of an area assigned to that assignee electric supplier to another electric supplier; and

(2) If it determines that public convenience and necessity so require, assign to any electric supplier all or any portion of a geographic area which thereto-

fore has been an unassigned area-A or an unassigned area-B.

(e) Notwithstanding any other provision of this part:

(1) No portion of a line constructed after March 29, 1973, by an electric supplier inside another electric supplier's assigned area, inside an unassigned area-A, or inside a municipality to serve premises which, but for the exception provided for in subsection (a) of this Code section, it would not have had the right to serve shall acquire any other service rights therein or impair or diminish any service rights of an assignee electric supplier or the service rights accruing to the lines of any electric supplier inside any assigned area, unassigned area-A, or municipality, provided that such electric supplier may extend and furnish service from such line to any other premises which it otherwise has the right to serve;

(2) No portion of a line constructed after March 29, 1973, by an electric supplier inside an unassigned area-B to serve premises which, but for the exception provided for in subsection (a) of this Code section, it would not have had the right to serve shall impair or diminish any service rights accruing to the lines of any other electric supplier inside such unassigned area-B, provided that such electric supplier may extend and furnish service from such line to any other premises which it otherwise has the right to serve;

(3) No portion of a line constructed after March 29, 1973, by an electric supplier for the initial sole purpose of furnishing service at wholesale shall

acquire any other service rights or impair or diminish the service rights of any assignee electric supplier or the service rights accruing to the lines of any electric supplier, provided that such electric supplier may extend and furnish service from such line to any other premises which it otherwise has the right to serve;

(4) No electric supplier shall, after March 29, 1973, construct its lines to serve new premises except in accordance with sound electric utility standards. If, after a hearing involving the affected electric suppliers and any other interested party, the commission determines that an electric supplier is about to violate, is violating, or has violated such standards so as arbitrarily to preempt areas or arbitrarily to gain service rights for such a line, the commission is authorized and directed:

(A) To order the offending electric supplier to cease and desist such construction or to alter and relocate the same; or

(B) To declare that such line or any offending portion thereof shall not be taken into account in assigning an area or in locating an assigned area boundary or shall not acquire any service rights that would otherwise accrue thereto or impair or diminish any service rights accruing to the lines of any other electric supplier;

(5) Any electric supplier may extend and furnish service to any of its own premises devoted to public service, whether the same shall have already been served by another electric supplier, but no line constructed for such purpose after March 29, 1973,

shall acquire any other service right or impair or diminish the service rights of any assignee electric supplier or the service rights accruing to the lines of any electric supplier, provided that such electric supplier may extend and furnish service from such line to other premises which it otherwise has the right to serve;

(6) No line of a secondary supplier constructed prior to March 29, 1973, which on that date is not providing retail service to one or more premises within the limits of the municipality as they exist on that date shall acquire any service rights to provide retail service to any premises located within such municipal limits as they exist on that date.

(f) The time at which an electric supplier, based upon the location or proximity of electric suppliers' lines as in this part provided for, shall be considered as having the right to extend and furnish, or as being restricted from extending and furnishing, service to new premises shall be the time at which written application for temporary construction or permanent service is made to any electric supplier by the consumer utilizing such premises or the time at which construction of such premises is commenced, whichever first occurs. The location of a premises for temporary construction service shall be deemed to be the same as the location of the premises which shall require permanent service after construction. If temporary construction service is required at one site for the purpose of beginning the construction of premises at two or more sites, this subsection shall not preclude an electric supplier, if chosen by the builder and having the right to serve at least one of the premises to be constructed, from furnishing all of such temporary construction service, notwithstanding the fact that one or more

other electric suppliers may have and may exercise the exclusive right thereafter to extend and furnish the permanent service to one or more of the premises being constructed.

(g) Whenever, after March 29, 1973, any new premises requiring service are so sited as to be located partially within an assigned area, an unassigned area-A, or an unassigned area-B and also partially within any other assigned area, unassigned area-A, or unassigned area-B, such premises may be served by that electric supplier chosen by the consumer utilizing such premises from among the electric suppliers which are eligible under this part to extend and furnish such service within any of such areas.

(h) Notwithstanding any other provisions of this part, if a majority of those voters of a municipality which was not rendering electric service on March 29, 1973, approve, by means of referendum vote, the purchase, construction, extension, operation, and maintenance of an electric distribution system by that municipality, such municipality is granted the right of eminent domain to condemn all of the lines and other facilities of the primary supplier within such municipality and any secondary supplier located within the corporate limits of such municipality and used to serve customers therein at retail. This right shall expire, with respect to each such municipality, one year after the date the results of such referendum are declared unless, before that date, such municipality institutes proceedings to acquire such lines and other facilities under any of the statutory methods provided for the condemnation of private property. Upon a final order of condemnation of such lines and other facilities, such municipality shall become the primary supplier therein, the rights of the former primary supplier

and any such secondary suppliers under subsection (b) of this Code section shall cease, and the consumers served thereby within such corporate limits shall be thereafter served by the municipality as the new primary supplier. The transfer of service shall be accomplished as nearly as practicable without interruption of service to the consumers. Electric suppliers are authorized to negotiate the sale and purchase of all or any part of any such lines and other facilities, and upon the transfer of title thereto the rights of the selling supplier under subsection (b) of this Code section shall cease. (Ga. L. 1973, p. 200, § 9.)

46-3-9. Limitation on power of electric membership corporations to furnish service within municipalities.

Notwithstanding any other provision of law, no electric membership corporation shall be authorized or empowered to furnish service inside the corporate limits of any municipality except:

(1) If it is already furnishing service therein on March 29, 1973, or if its lines become annexed, including annexation that may be caused by the merger, consolidation, or any other combination of a then existing municipality and one or more other geographically defined political subdivisions, if the resulting political subdivision constitutes a municipality as defined in Code Section 46-3-3, or if its lines become included in a wholly new municipality, in any of which events the other relevant Code sections of this part shall apply and prevail;

(2) To extend and furnish service initially inside a municipality the population of which at the time of such initial service is 1,500 or less, but not

inconsistently with the other Code sections of this part; or

(3) Notwithstanding paragraphs (1) and (2) of this Code section, if the municipality and all electric suppliers then furnishing service inside such municipality or furnishing electric service to the municipality at wholesale so consent. (Ga. L. 1973, p. 200, § 13; Ga. L. 1982, p. 3, § 46.)

46-3-10. Limitation on power of electric suppliers to condemn property of other electric suppliers.

Notwithstanding any other provision of law, no electric supplier shall be authorized or empowered to exercise the power of eminent domain for the purpose of acquiring any property, whether real or personal, of another electric supplier which property is devoted to the public use in furnishing wholesale or retail electric service if such acquisition would destroy or unduly impair or interfere with the operation or use of such property by such other electric supplier. (Ga. L. 1973, p. 200, § 14.)

46-3-11. Application by electric supplier of discriminatory rates, charges, etc.; prohibited acts by electric suppliers generally.

(a) Every electric supplier is prohibited from having or applying any rate, charge, or service rule or regulation which unreasonably discriminates against or in favor of (1) any member of a class of consumers as opposed to any other consumer who is or should be in the same class of consumers for such purposes, or (2) any class of its consumers as opposed to another class of consumers for such purposes, provided that this prohibition shall not apply to any rate, charge, or service rule or regulation

relating solely to service rendered by a municipality to consumers whose premises are located within its limits as they existed on March 29, 1973.

(b) Notwithstanding any other provision of law, every electric supplier is prohibited from, directly or indirectly, by ordinance, law, policy, contract, rate, regulation, or otherwise:

(1) Requiring that a consumer receive retail electric service from such electric supplier as a condition for such consumer to receive from such electric supplier or any other person any goods or other services that are not reasonably related to the furnishing of retail electric service to such consumer's premises;

(2) Offering a consumer lesser charges or more favorable terms or conditions for retail electric service because of such consumer's receiving or agreeing to receive from such electric supplier any goods or other services that are not reasonably related to the furnishing of retail electric service to such consumer's premises;

(3) Imposing higher charges for any goods or other services that are not reasonably related to the furnishing of retail electric service to a consumer's premises because of such consumer's failure or refusal to receive retail electric service from that supplier; or

(4) Furnishing retail electric service to any premises which such electric supplier is not entitled to serve under this part. (Ga. L. 1973, p. 200, § 10.)

46-3-12. Jurisdiction of commission over electric membership corporations.

All electric membership corporations which furnish service in the State of Georgia and all municipalities, whether incorporated by this state or not, which furnish service inside the state shall, in addition to the manner and extent otherwise provided for in this part, be subject to the authority and jurisdiction of the commission in the same manner as electric light and power companies are subject under other laws of the State of Georgia and regulations of the commission pursuant thereto, provided that the rates, charges, and service rules and regulations of electric membership corporations and municipalities shall be filed with the commission and shall be subject to Code Section 46-3-11 but shall not otherwise be fixed by the commission; provided, further, that securities issued by a municipality relating solely to service rendered inside its limits as they existed on March 29, 1973, shall not be subject to regulation by the commission; provided, further, that service rendered by any electric supplier shall be made pursuant to and consistent with its rates, charges, and service rules and regulations then in effect. (Ga. L. 1973, p. 200, § 11.)

46-3-13. Enforcement of part by commission.

At any time, upon its own complaint or the complaint of any other electric supplier or any other interested party, the commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and other interested parties, and after a hearing, to enforce the provisions of this part by appropriate orders. (Ga. L. 1973, p. 200, § 12.)

46-3-14. Effect of part on municipal police powers over electric wires, poles, etc.; impairment by municipalities of rights and restrictions of suppliers other than primary suppliers; effect of part on powers of municipalities relating to granting of street franchises.

(a) No provision of this part shall restrict the reasonable exercise of the police power of a municipality over the erection and maintenance of poles, wires, and other facilities of electric suppliers in streets, alleys, and public ways.

(b) No municipality may, by unreasonably withholding or conditioning right of way easements or franchises, defeat, impair, or interfere with the rights and restrictions applying to electric suppliers therein as provided for in this part. Rather, any secondary supplier within a municipality existing on March 29, 1973, and any electric supplier other than the primary supplier within any geographic area thereafter annexed to such municipality, shall pay the municipality for street franchise rights a sum of money calculated and payable in the same manner and on the same basis as is utilized with respect to the payment, if any, by the primary supplier (other than the municipality itself) for the same or substantially identical rights. In addition, any electric supplier within a wholly new municipality at the time such municipality comes into existence or thereafter which does not serve a majority or plurality of the retail electric meters inside the limits of such municipality shall pay such municipality for street franchise rights a sum of money calculated and payable in the same manner and on the same basis as is utilized with respect to the payment, if any, by the electric supplier (other than the municipality itself) which serves a majority or plurality, whichever is the case, of the retail electric

meters inside the limits of such municipality for the same or substantially identical rights.

(c) No provision of this part shall abolish the power of any incorporated municipality pursuant to paragraph (7) of Code Section 36-34-2 or any other provision of law to grant street franchises; nor shall any provision of this part abolish the requirement, to the extent existing on March 29, 1973, that any electric supplier must obtain such a franchise in order to use and occupy streets of an incorporated municipality for the purpose of rendering utility services. (Ga. L. 1973, p. 200, § 15.)

46-3-15. Effect of part on charges of public utilities owned or operated by counties or municipalities.

No provision of this part, and no application thereof, shall be construed in any way to regulate or fix charges of county owned or operated or municipality owned or operated public utilities, as prohibited by Article III, Section VI, Paragraph V(d) of the Constitution of Georgia. (Ga. L. 1973, p. 200, § 15A; Ga. L. 1983, p. 3, § 62; Ga. L. 1984, p. 22, § 46.)

OFFICIAL CODE OF GEORGIA ANNOTATED
(Michie 1990 & Supp. 1991)
Title 50

ARTICLE 3

STATE PURCHASING

PART 1

GENERAL AUTHORITY, DUTIES, AND PROCEDURE

50-5-50. Purposes and policies of part.

The underlying purposes and policies of this part are:

(1) To permit the continued development of centralized procurement policies and practices;

(2) To control and reduce the cost of purchasing, leasing, renting, or otherwise procuring supplies, materials, services, and equipment through the use of centralized purchasing;

(3) To ensure openness and accessibility by all qualified vendors to the state's purchasing processes so as to achieve the lowest possible costs to the state through effective competition among such vendors;

(4) To provide for timely, effective, and efficient service to using agencies and to vendors doing business with the state;

(5) To ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;

(6) To provide for increased public confidence in the procedures followed in public procurement; and

(7) To provide safeguards for the maintenance of a procurement system of quality and integrity. (Ga. L. 1931, p. 7, § 2; Code 1933, § 40-1901; Ga. L. 1937, p. 503, § 1; Ga. L. 1939, p. 160, § 1; Ga. L. 1950, p. 280, § 1; Ga. L. 1955, p. 643, § 1; Ga. L. 1979, p. 659, § 1.)

50-5-51. Power, authority, and duty of department.

The Department of Administrative Services shall have the power and authority and it shall be the department's duty, subject to this part:

(1) To canvass all sources of supply and to contract for the lease, rental, purchase, or other acquisition of all supplies, materials, services other than professional and personal employment services, and equipment required by the state government or any of its departments, institutions, or agencies under competitive bidding in the manner and subject to the conditions hereinafter provided for;

(2) To establish and enforce standard specifications which shall apply to all supplies, materials, and equipment purchased or to be purchased for the use of the state government for any of its departments, institutions, or agencies;

(3) To contract for all telephones, telegraph, electric light power, postal, and any and all other contractual purchases and needs of the state government or any of its departments, institutions, or agencies; or in lieu of such contract to authorize any department, institution, or agency to purchase or contract for any or all such services;

(4) To have general supervision of all storerooms and stores operated by the state government or any of its departments, institutions, or agencies; to provide for transfer or exchange to or between all state departments, institutions, and agencies or to sell all supplies, materials, and equipment which are surplus, obsolete, or unused; and to maintain inventories of all fixed property and of all movable equipment, supplies, and materials belonging to the state government or any of its departments, institutions, or agencies;

(5) To make provision for and to contract for all state printing, including all printing, binding, paper stock, and supplies or materials in connection with the same, except as hereinafter provided. For the purpose of obtaining bids on printing, it shall have the power to divide the printing into various classes and to provide stipulations and specifications therefor and advertise, receive bids, and contract separately for the various classes;

(6) To procure all fidelity bonds covering state officials and employees required by law or administrative directive to give such bonds; and, in order to provide the bonds at a minimum expense to the state, the bonds may be procured under a master policy or policies providing insurance agreements on a group or blanket coverage basis with or without deductibles or excess coverage over the state's retention as determined by the commissioner. Fidelity bonds covering state officials and employees which are procured pursuant to this paragraph shall expressly provide that all state officials and employees who are required by law to be bonded be named in the fidelity bond as insureds or beneficiaries under the terms of

the fidelity bond. Inclusion of any state official, officer, or employee required by law or administrative directive to be specifically bonded in a master fidelity bond under the terms of this part shall satisfy any statutory requirement that the official, officer, or employee be bonded. Fidelity bonds procured pursuant to this paragraph shall also expressly provide for indemnification, out of the proceeds of the fidelity bonds, of all state officials and employees for any liability or expense of any nature resulting from a claim on the state official's or employee's bonds which is due to or as a result of an act of a subordinate of the state official or employee. In order to finance the continuing liability established with other agencies of state government, the commissioner is authorized to retain all moneys paid to the department as premiums on policies of insurance, all moneys received as interest, and all moneys received from other sources to set up and maintain a reserve for the payment of such liability and the expenses necessary to administer properly the insurance program. The commissioner shall invest the moneys in the same manner as other such moneys in his possession; and

(7) To establish and operate the state agency for surplus property for the purpose of distributing surplus properties made available by the federal government under Pub. L. 152, 81st Congress, as amended, to institutions, organizations, agencies, and others as may be eligible to receive such surplus properties pursuant to applicable provisions of federal law. The commissioner may enter into or authorize the aforesaid state agency for surplus property to enter into cooperative agreements with the federal

government for the use of surplus properties by the state agency. The commissioner is authorized to enter into contracts with other state, local, or federal agencies or with other persons with respect to the construction, operation, maintenance, leasing, or rental of a facility for use by the state agency. Further, the commissioner may acquire real or personal property for such purposes. All personnel; personal property, including records, office equipment, supplies, contracts, books, papers, documents, maps, appropriations, accounts within and outside the state treasury, funds, and vehicles; and all other similar property under the control of the State Board of Education and used for the direct support and operation of the state agency for surplus property are transferred to the Department of Administrative Services. Each state officer or employee affected under this paragraph shall be entitled to all rights which he possessed as a state officer or employee before July 1, 1978, including all rights of rank or grade, rights to vacation, sick pay and leave, rights under any retirement or personnel plan, and any other rights under law or administrative policy. This paragraph is not intended to create any new rights for any state officer or employee but to continue only those rights in effect before July 1, 1978. (Ga. L. 1931, p. 7, § 3; Code 1933, § 40-1902; Ga. L. 1937, p. 503, § 2; Ga. L. 1943, p. 406, § 1; Ga. L. 1960, p. 78, § 1; Ga. L. 1960, p. 1098, § 1; Ga. L. 1962, p. 644, § 1; Ga. L. 1974, p. 504, § 1; Ga. L. 1975, p. 672, § 1; Ga. L. 1976, p. 252, § 12; Ga. L. 1978, p. 1144, § 1; Ga. L. 1978, p. 1701, § 1; Ga. L. 1979, p. 659, § 2.)

* * * *

50-5-54. Rules and regulations to be made and published.

The commissioner of administrative services is authorized and empowered by this part to make all rules, regulations, and stipulations and to provide specifications to carry out the terms and provisions of this part as may be necessary for the purposes of this part. The rules and regulations as prescribed by the commissioner shall be published in pamphlet form and all the departments of the state government shall be furnished with copies of the same. (Ga. L. 1939, p. 160, § 2.)

50-5-55. Specified purposes for rules and regulations.

The commissioner of administrative services may adopt, modify, or abrogate rules and regulations covering the following purposes, in addition to those authorized elsewhere in this part:

(1) Requiring monthly reports by state departments, institutions, or agencies of stocks, supplies, materials, and equipment on hand and prescribing the form of such reports;

(2) Prescribing the manner in which supplies, materials, and equipment shall be delivered, stored, and distributed;

(3) Prescribing the manner of inspecting deliveries of supplies, material, and equipment and making chemical or physical tests of samples submitted with bids and samples of deliveries to determine whether deliveries have been made to the departments, institutions, or agencies in compliance with specifications;

(4) Prescribing the manner in which purchases shall be made by the Department of Administrative

Services in all emergencies as defined in Code Section 50-5-71; and

(5) Providing for such other matters as may be necessary to give effect to the foregoing rules and the provisions of this part. (Ga. L. 1937, p. 503, § 13; Ga. L. 1939, p. 160, § 6.)

* * *

50-5-57. Duty of department to purchase all supplies, services, materials, and equipment; requisition by state agencies; unlawful purchases.

The Department of Administrative Services shall have the power and authority and it shall be the department's duty, subject to this part, to contract for the purchase, lease, or other mode of acquisition of all supplies, materials, services other than professional and personal employment services, and equipment required by the state. After sources of supply have been established by contract under competitive bidding and certified by the Department of Administrative Services to the different departments, institutions, and agencies of the state as provided for in this part, the institutions, agencies, or departments of the state shall make requisition on blanks to be approved by the Department of Administrative Services for such supplies, materials, and equipment required by them from the supply so certified and, except as otherwise provided for or unless the departments, institutions, and agencies of the state obtain written authority from the Department of Administrative Services to do so, it shall be unlawful for any of them to purchase any supplies, materials, or equipment from sources other than as certified to them by the Department of Administrative Services. One copy of the requisition shall be sent to the

Department of Administrative Services when the same is issued. (Ga. L. 1950, p. 181, § 1; Ga. L. 1979, p. 659, § 3.)

50-5-58. Cases where purchases through department not mandatory.

(a) Unless otherwise ordered by the Department of Administrative Services, the purchase of supplies, materials, equipment, and services, other than professional and personal employment services, through the Department of Administrative Services shall not be mandatory in the following cases:

(1) Technical instruments and supplies and technical books and other printed matter on technical subjects; also manuscripts, maps, books, pamphlets, and periodicals for the use of the State Library or any other library in the state supported by state funds; also services;

(2) Livestock for slaughter and perishable articles such as fresh vegetables, fresh meat, fish and oysters, butter, eggs, poultry, and milk. No other article shall be considered perishable within the meaning of this clause unless so classified by the Department of Administrative Services; and

(3) Emergency supplies of drugs, chemicals and sundries, dental supplies, and equipment.

(b) In the purchasing of emergency supplies under paragraph (3) of subsection (a) of this Code section, it shall be the duty of the department making such purchases to report same to the Department of Administrative Services, giving the circumstances necessitating the purchases.

(c) Nothing in this part shall be construed to give the Department of Administrative Services any supervision over the selection or purchase of school textbooks, which is vested by law in the Department of Education.

(d) The Department of Administrative Services is authorized to permit departments, institutions, and agencies of state government to purchase supplies, material, and equipment on confirmation if these individual purchases do not exceed $100.00 and if these supplies, materials, and equipment are not under contract or purchased on a continuing basis. The Department of Administrative Services may regulate the dollar limit of these individual purchases by official memorandum at any amount not to exceed $100.00. The commissioner of administrative services shall promulgate the rules and regulations necessary to carry out the intent of this subsection. Nothing in this subsection shall apply to or affect the laws, rules, and regulations governing emergency purchases. (Ga. L. 1937, p. 503, § 8; Ga. L. 1939, p. 160, § 4; Ga. L. 1970, p. 287, § 1; Ga. L. 1979, p. 659, § 6.)

* * * *

50-5-67. Competitive bidding procedure.

[Note: Statute as it existed during time period relevant to this proceeding]

(a) Except as otherwise provided in this Code section, if the total requirement of any given commodity will involve an expenditure in excess of $5,000.00, sealed bids shall be solicited by advertisement in a newspaper of state-wide circulation at least once and at least ten days prior to the date fixed for opening of the bids and

awarding of the contract. Other methods of advertisement, however, may be adopted by the Department of Administrative Services when such other methods are deemed more advantageous for the particular item to be purchased. In any event, it shall be the duty of the Department of Administrative Services to solicit bids directly by mail from reputable owners of supplies in all cases where the total requirements will exceed $5,000.00. When it appears that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals, subject to the following conditions:

(1) This method of solicitation shall only be used after a written determination by the Department of Administrative Services that the use of competitive sealed bidding is not practicable or is not advantageous to the state;

(2) Proposals shall be solicited through a request for proposals;

(3) Adequate public notice of the request for proposals shall be given in the same manner as provided for competitive sealed bidding;

(4) Proposals shall be opened in the same manner as competitive sealed bids. A register of proposals shall be prepared and made available for public inspection;

(5) The request for proposals shall state the relative importance of price and other evaluation factors;

(6) As provided in the request for proposals and under regulations to be developed by the Department of Administrative Services, discussions may be

conducted with reasonable offerors who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals; and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions there shall be no disclosure of any information derived from proposals submitted by competing offerors; and

(7) The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

(b) Except as otherwise provided for in this part, all contracts for the purchases of supplies, materials, or equipment made under this part shall, wherever possible, be based upon competitive bids and shall be awarded to the lowest responsible bidder, taking into consideration the quality of the articles to be supplied and conformity with the standard specifications which have been established and prescribed, the purposes for which the articles are required, the discount allowed for prompt payment, the transportation charges, and the date or dates of delivery specified in the bid. Competitive bids on such contracts shall be received in accordance with rules and regulations to be adopted by the commissioner of admin-

istrative services, which rules and regulations shall prescribe, among other things, the manner, time, and places for proper advertisement for the bids, indicating the time and place when the bids will be received; the article for which the bid shall be submitted and the standard specification prescribed for the article; the amount or number of the articles desired and for which the bids are to be made; and the amount, if any, of bonds or certified checks to accompany the bids. Any and all bids so received may be rejected.

(c) When bids received pursuant to this part are unreasonable or unacceptable as to terms and conditions, are noncompetitive, or the low bid exceeds available funds and it is determined in writing by the Department of Administrative Services that time or other circumstances will not permit the delay required to resolicit competitive bids, a contract may be negotiated pursuant to this Code section, provided that each responsible bidder who submitted such a bid under the original solicitation is notified of the determination and is given a reasonable opportunity to negotiate. In cases where the bids received are noncompetitive or the low bid exceeds available funds, the negotiated price shall be lower than the lowest rejected bid of any responsible bidder under the original solicitation.

(d) Every bid conforming to the terms of the advertisement provided for in this Code section, together with the name of the bidder, shall be recorded, and all such records with the name of the successful bidder indicated thereon shall, after award or letting of the contract, be subject to public inspection upon request. The Department of Administrative Services shall also, within five days after the award or letting of the contract, publish the name of the successful bidder on public display in a

conspicuous place in the department's office so that it may be easily seen by the public. The public notice on public display shall also show the price or the amount for which the contract was let and the commodities covered by the contract. The Department of Administrative Services shall also, within five days after the award or letting of the contract, publish on public display the names of all persons whose bids were rejected by it, together with a statement giving the reasons for such rejection. All the information required to be placed on public display in a conspicuous place at the office of the Department of Administrative Services shall also be recorded in a permanent book to be kept by the Department of Administrative Services, which record shall always be subject to public inspection upon request. Bids shall be opened in public by the Department of Administrative Services, which shall canvass the bids and award the contract according to the terms of this part. A proper bond for the faithful performance of any contract shall be required of the successful bidder in the discretion of the Department of Administrative Services. After the contracts have been awarded, the Department of Administrative Services shall certify to the various departments, institutions, and agencies of the state government the sources of the supplies and the contract price of the various supplies, materials, and equipment so contracted for.

(e) On all sealed bids received or solicited by the Department of Administrative Services, by any department, agency, board, or bureau of the state, or by any person in behalf of any department, agency, board, or bureau of the state, except in cases provided for in Code

Section 50-5-58, the following certificate of independent price determination shall be used:

> "I certify that this bid is made without prior understanding, agreement, or connection with any corporation, firm, or person submitting a bid for the same materials, supplies, or equipment and is in all respects fair and without collusion or fraud. I understand collusive bidding is a violation of state and federal law and can result in fines, prison sentences, and civil damage awards. I agree to abide by all conditions of this bid and certify that I am authorized to sign this bid for the bidder."

(Ga. L. 1937, p. 503, § 6; Ga. L. 1939, p. 160, § 3; Ga. L. 1978, p. 1054, §§ 1, 2; Ga. L. 1979, p. 659, §§ 4, 5; Ga. L. 1980, p. 90, § 2.)

50-5-67. Competitive bidding procedure.

[Note: Statute as amended in 1991 (subsequent to time period relevant to this proceeding)]

(a) Except as otherwise provided in this Code section, contracts exceeding $10,000.00 shall be awarded by competitive sealed bidding. If the total requirement of any given commodity will involve an expenditure in excess of $50,000.00, sealed bids shall be solicited by advertisement in a newspaper of state-wide circulation at least once and at least 15 working days prior to the date fixed for opening of the bids and awarding of the contract. Other methods of advertisement, however, may be adopted by the Department of Administrative Services when such other methods are deemed more advantageous for the particular item to be purchased. In any event, it shall be the duty of the Department of Administrative Services to solicit bids directly by mail from reputable

owners of supplies in all cases where the total requirement will exceed $10,000.00. When it appears that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals, subject to the following conditions:

(1) This method of solicitation shall only be used after a written determination by the Department of Administrative Services that the use of competitive sealed bidding is not practicable or is not advantageous to the state;

(2) Proposals shall be solicited through a request for proposals;

(3) Adequate public notice of the request for proposals shall be given in the same manner as provided for competitive sealed bidding;

(4) Proposals shall be opened in the same manner as competitive sealed bids. A register of proposals shall be prepared and made available for public inspection;

(5) The request for proposals shall state the relative importance of price and other evaluation factors;

(6) As provided in the request for proposals and under regulations to be developed by the Department of Administrative Services, discussions may be conducted with reasonable offerors who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to

any opportunity for discussion and revision of proposals; and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions there shall be no disclosure of any information derived from proposals submitted by competing offerors; and

(7) The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

(b) Except as otherwise provided for in this part, all contracts for the purchases of supplies, materials, or equipment made under this part shall, wherever possible, be based upon competitive bids and shall be awarded to the lowest responsible bidder, taking into consideration the quality of the articles to be supplied and conformity with the standard specifications which have been established and prescribed, the purposes for which the articles are required, the discount allowed for prompt payment, the transportation charges, and the date or dates of delivery specified in the bid. Competitive bids on such contracts shall be received in accordance with rules and regulations to be adopted by the commissioner of administrative services, which rules and regulations shall prescribe, among other things, the manner, time, and places for proper advertisement for the bids, indicating the time and place when the bids will be received; the article for which the bid shall be submitted and the standard specification prescribed for the article; the amount or number of

the articles desired and for which the bids are to be made; and the amount, if any, of bonds or certified checks to accompany the bids. Any and all bids so received may be rejected.

(c) When bids received pursuant to this part are unreasonable or unacceptable as to terms and conditions, are noncompetitive, or the low bid exceeds available funds and it is determined in writing by the Department of Administrative Services that time or other circumstances will not permit the delay required to resolicit competitive bids, a contract may be negotiated pursuant to this Code section, provided that each responsible bidder who submitted such a bid under the original solicitation is notified of the determination and is given a reasonable opportunity to negotiate. In cases where the bids received are noncompetitive or the low bid exceeds available funds, the negotiated price shall be lower than the lowest rejected bid of any responsible bidder under the original solicitation.

(d) Every bid conforming to the terms of the advertisement provided for in this Code section, together with the name of the bidder, shall be recorded, and all such records with the name of the successful bidder indicated thereon shall, after award or letting of the contract, be subject to public inspection upon request. The Department of Administrative Services shall also, within five days after the award or letting of the contract, publish the name of the successful bidder on public display in a conspicuous place in the department's office so that it may be easily seen by the public. The public notice on public display shall also show the price or the amount for which the contract was let and the commodities covered by the contract. The Department of Administrative Services shall also, within five days after the award or letting

of the contract, publish on public display the names of all persons whose bids were rejected by it, together with a statement giving the reasons for such rejection. All the information required to be placed on public display in a conspicuous place at the office of the Department of Administrative Services shall also be recorded in a permanent book to be kept by the Department of Administrative Services, which record shall always be subject to public inspection upon request. Bids shall be opened in public by the Department of Administrative Services, which shall canvass the bids and award the contract according to the terms of this part. A proper bond for the faithful performance of any contract shall be required of the successful bidder in the discretion of the Department of Administrative Services. After the contracts have been awarded, the Department of Administrative Services shall certify to the various departments, institutions, and agencies of the state government the sources of the supplies and the contract price of the various supplies, materials, and equipment so contracted for.

(e) On all sealed bids received or solicited by the Department of Administrative Services, by any department, agency, board, or bureau of the state, or by any person in behalf of any department, agency, board, or bureau of the state, except in cases provided for in Code Section 50-5-58, the following certificate of independent price determination shall be used:

> "I certify that this bid is made without prior understanding, agreement, or connection with any corporation, firm, or person submitting a bid for the same materials, supplies, or equipment and is in all respects fair and without collusion or fraud. I understand collusive bidding is a violation of state and federal law and can result in fines, prison sentences,

and civil damage awards. I agree to abide by all conditions of this bid and certify that I am authorized to sign this bid for the bidder."

(Ga. L. 1937, p. 503, § 6; Ga. L. 1939, p. 160, § 3; Ga. L. 1978, p. 1054, §§ 1, 2; Ga. L. 1979, p. 659, §§ 4, 5; Ga. L. 1980, p. 90, § 2; Ga. L. 1991, p. 1380, § 1.)

* * * *

50-5-69. Purchases without competitive bidding.

If the needed supplies, materials, or equipment can reasonably be expected to be acquired for less than $500.00 and are not available on state contracts, the purchase may be effectuated without competitive bidding. The commissioner of administrative services may by rule and regulation authorize the various state departments, agencies, and instrumentalities to make purchases in their behalf which do not exceed $5,000.00 and may provide the circumstances and conditions under which such purchases may be effected. (Ga. L. 1976, p. 752, § 1; Ga. L. 1980, p. 90, § 4; Ga. L. 1983, p. 520, § 1.)

GEORGIA VENDOR MANUAL

PART 1.

VENDOR INFORMATION AND PROCEDURES

ARTICLE I

INTRODUCTION

SECTION 1 — Purpose of the Vendor Manual

The Purpose of the **Georgia Vendor Manual** is to acquaint prospective Vendors with the State Purchasing system and to advise them as to the proper procedures for doing business with the State. This **Manual** is intended to be an exhaustive presentation of Vendor information and procedures. However, if specific questions arise that are not answered in the Manual, Vendors may address such questions in writing to:

Department of Administrative Services
Purchasing and Surplus Property Division
200 Piedmont Avenue, S.E.
Floyd Building — West Tower Suite 1302
Atlanta, Georgia 30335

SECTION 2 — Authority of the Purchasing and Surplus Property Division

The Department of Administrative Services is the agency of the State of Georgia charged with the responsibility for the establishment and administration of contracts, leases, purchase orders or other agreements for the procurement of supplies, materials, equipment, services and construction for other agencies of the State. All State agencies, departments and institutions are required to purchase through the Department of Administrative Services unless specifically exempted by statute or Departmental

regulation. The Purchasing and Surplus Property Division is the branch of the Department of Administrative Services which is responsible for the procurement of supplies, materials, equipment, services, or construction.

SECTION 3 — Purchasing Laws, Rules and Regulations

Laws concerning the Department of Administrative Services and the procurement process in general may be found in the Official Code Of Georgia Annotated, Title 50, Chapter 5, Article 3. Rules and regulations, interpreting and implementing the State's purchasing laws and detailing policies and procedures, are set forth in this **Manual.** These rules and regulations cover the entire purchasing process and contain definitions and provisions that the Vendor will find useful in understanding the State's purchasing system and in interacting with it.

SECTION 4 — Responsibilities of the Purchasing and Surplus Property Division

The Purchasing and Surplus Property Division has a responsibility to serve the State objectively, economically, and efficiently; to provide effective service to State Agencies and to follow ethical practices in all relationships with Vendors.

The Purchasing and Surplus Property Division is specifically authorized and required to do the following:

(a) To contract for all supplies, materials, equipment, construction, or services required by the State that are not exempted by statute.

(b) To determine total State requirements for any given commodity by examining purchase records or reports submitted by Vendors, and to establish term con-

tracts and consolidated purchases for use by one or more State and/or local government agencies.

(c) To establish and adopt rules and regulations implementing state procurement of supplies, materials, equipment, services, and construction.

(d) To request informal written or telephone quotations, whenever possible, for all purchases in excess of $500, but not more than $5,000, and to solicit sealed bids, whenever possible, for all purchases in excess of $5,000.

(e) To open all sealed bids publicly and to maintain purchase records that are open to public inspection.

SECTION 5 — Purchases by Local Political Subdivisions

Local political subdivisions, including counties, municipalities, and school boards, are authorized by State law to purchase their supplies, materials, and equipment through the Purchasing and Surplus Property Division if they so desire. Purchases pursuant to this authorization may be by one-time open market purchase, by the establishment of a special term contract, or by purchase by the local political subdivision directly from a Statewide Contract. All products offered in Statewide Contracts may be offered to local political subdivisions as well as State Agencies at the option of the Vendor. The Statewide Contract bid form includes a section which should be completed to indicate the Vendor's intentions with respect to local governments.

SECTION 6 — Exemptions from Purchase through the Purchasing and Surplus Property Division

State statutes authorize the Department of Transportation, the various public authorities, the Board of Regents, and the Department of Labor through the Unemployment Trust Fund, to contract for construction projects. Additionally, all State Agencies may contract directly for construction projects that involve amounts of less than $5,000. Also exempt from Purchasing and Surplus Property Division rules and regulations are procurements by the legislative and judicial branches of State government; purchases of school buses and textbooks by the Department of Education; procurements of real property; procurements for agricultural experiment stations covered by the Hatch Act; Smith-Lever Act Purchases; procurements for travel, stipends, scholarships, honoraria, fellowship fund transfers, authority leases or rentals, assessments, corporate registrations, payroll and benefit remittances, deposits and benefits, and procurements of professional or personal employment services.

(1) Personal services are defined as only those services rendered by a person who works full time or part time for and under the control of the State and receives his compensation as a salary in direct payment from a department, agency, or institution of State Government.

(2) Professional services are defined as only those services rendered by a member of one of the following professions while acting in his/her professional capacity: Certified Public Accountancy, Law, Medicine and Surgery (including Dentistry), Architecture, Professional Engineering, Applied Psychology, Land

Surveying, Chiropractic, Optometry, and Veterinary Medicine.

SECTION 7 — Procurement from Other State Agencies

State Statutes and the regulations of the Purchasing and Surplus Property Division require State Agencies to purchase certain products and services from other agencies of the State whenever such services or products are required. These include, but are not limited to, the products of the Georgia Industries for the Blind, Georgia Correctional Industries and Department of Human Resources Sheltered Workshops. The procurement of such products is not subject to the competitive bid requirements of the Georgia Code.

SECTION 8 — Open Records

The records of the Purchasing and Surplus Property Division are open and accessible to the public in accordance with the provisions of the Georgia Open Records Act. Requests for inspection of records must be reasonable, must contain sufficient information to facilitate retrieval, and must not interfere with the orderly operation of the Division. The records of individual purchases or bids are not available for inspection until after award; and bidders are, therefore, encouraged to attend any bid opening in which they have an interest.

The Purchasing and Surplus Property Division reserves the right to charge the general public for cost incurred to provide copies of records. However, the Division maintains a public view file of pending and awarded bids for the convenience of the public in their Bid Room. The

public is welcome to review these records during regular working hours (8:00 A.M. - 4:30 P.M.).

SECTION 9 — Visits by Salesmen or Other Vendor Representatives

The Purchasing and Surplus Property Division encourages visits by salesmen to members of its staff for the purpose of imparting specialized current information concerning their products. To regulate operations, such visits are normally limited to Tuesday through Thursday of each week, and salesmen are requested to make appointments in advance.

ARTICLE II

STATE PURCHASES IN GENERAL

SECTION 1 — Types of Purchases

Two separate purchasing techniques are employed by the Purchasing and Surplus Property Division. The first is the one-time, open market purchase. When soliciting bids for such purchases, the State requires the Vendor to quote the exact prices and delivery dates for the commodities and quantities listed. The Second technique employed is the term contract purchase. Term contracts are contracts to supply the requirements of one or more agencies for various services or commodities for an extended period of time, generally one year. In most cases only estimates of the quantities required can be supplied. When quoting on term contracts, the Vendor is required to supply exact unit prices and firm delivery dates, stated in terms of days after receipt of order.

SECTION 2 — Delegated Authority to the Agencies

The Purchasing and Surplus Property Division is authorized to delegate purchasing authority to any or to all State agencies both for the procurement of certain classes of products and services and for procurements involving certain maximum dollar values regardless of the product or service involved. These delegated purchases are more fully explained in **Audited Purchase Authority**, Article IV, Section 3, and **Small Value Purchases**, Article IV, Section 2.

SECTION 3 — Purchase Orders

(a) A State of Georgia Purchase Order is one issued for supplies, materials, equipment, services, and construction procured by the Purchasing and Surplus Property Division for a User Agency. An illustration of a State Purchase Order may be found in Exhibit A.

(b) A Field Purchase Order is one issued directly to a Vendor by a State agency to initiate an authorized purchase by the agency. A Field Purchase Order is also issued by an agency to procure goods pursuant to any Agency Contract or Statewide Contract. When used in this way, the Field Purchase Order constitutes a release order and may be referred to as a Field Purchase Order Release. Receipt of a Field Purchase Order Release authorizes the Vendor to ship those specified goods covered in the Agency or Statewide Contract to the ordering agency. An illustration of a Field Purchase Order may be found in Exhibit B.

SECTION 4 — Competitive Bidding

All procurements made by the Purchasing and Surplus Property Division or by any other State Agency subject to the Purchasing Act will be based on competitive bidding whenever possible. The following dollar volume guidelines are applied to any such acquisitions:

(a) Acquisitions involving expenditures of $500 or less may be made without competitive bidding. When possible, however, more than one quotation will be obtained.

(b) Acquisitions involving expenditures of more than $500, but less than $5,000, will be made after solicitation of competitive bids by informal written bids or telephone quotations, whenever possible.

(c) Acquisitions involving expenditures in excess of $5,000 will be made after solicitation of sealed competitive bids, whenever possible.

ARTICLE III

PURCHASING TECHNIQUES AND TYPES OF CONTRACTS UTILIZED BY PURCHASING AND SURPLUS PROPERTY DIVISION

SECTION 1 — Informal Competitive Bidding

The Purchasing and Surplus Property Division may request informal written bids, or in some instances, telephone quotations for acquisitions involving expenditures of less than $5,000. All such requests will designate a closing date for the submission of quotations or bids. Telephone quotations will be carefully recorded, and the vendor may be required to confirm his quote in writing.

After the close of business (4:30 pm) on the closing date, the bids or quotations will be evaluated and a State Purchase Order will be issued to the successful bidder.

SECTION 2 — Sealed Bidding

State statutes require the Purchasing and Surplus Property Division to solicit sealed bids for all acquisitions involving expenditures in excess of $5,000. Invitations to bid are mailed to Vendors on a rotation basis using a bid list pulled for the particular commodity or service being sought. In addition, legal advertisements soliciting sealed bids may be placed in newspapers with statewide circulation. Sealed bids are always solicited for the establishment of Statewide Contracts. After the bids are publicly opened and read, the bids are evaluated, and a Purchase Order or Notice of Award is issued to the lowest responsible bidder.

In certain instances, when it is determined in writing by the Department of Administrative Services to be most advantageous to the State, a Request for Proposal (RFP) may be used to solicit offers for goods or services. The use of the RFP differs from the sealed bid solicitation only in the fact that no offers are made public at the time and date set for receipt of proposals. All responses are kept confidential until a contract award has been made. After award all files pertaining to the transaction become public.

SECTION 3 — Requests for Proposal

1. Authority

The Official Code of Georgia Annotated 50-5-67 authorizes the Department of Administrative Services to utilize competitive sealed proposals when it ap-

pears that the use of competitive sealed bidding is either not practicable or not advantageous to the state. The use of this technique, normally referred to as a Request for Proposal (RFP) is subject to the following restrictions:

(1) This method of solicitation shall only be used after a written determination by the Department of Administrative Services that the use of competitive sealed bidding is not practicable or is not advantageous to the state;

(2) Proposals shall be solicited through a request for proposals;

(3) Adequate public notice of the request for proposals shall be given in the same manner as provided for competitive sealed bidding;

(4) Proposals shall be opened in the same manner as competitive sealed bids. A register of proposals shall be prepared and made available for public inspection. **NOTE: The content of proposals submitted in response to a request for proposal will not be made public at the time of opening.**

(5) The request for proposals shall state the relative importance of price and other evaluation factors. **NOTE: No other factors, other than those set forth in the request for proposal document may be used in determining the lowest responsible offeror.**

NOTE: The use of the Request for Proposal technique is restricted to the Department of Administrative Services and may not be used by any other agency of the state.

2. Method

In general, the Request for Proposal is used in much the same way as comptitive sealed bids, however, at the time and date set for opening of proposals the contents of any offers received are not made public. All documentation pertaining to any solicitation made by this technique is kept confidential until such time as a contract award is made. After contract award all such documentation is made available for inspection by interested parties.

Offerors conferences are generally held during term of the solicitation to provide prospective offerors an opportunity to clear up any misunderstanding they may have regarding the request for proposal requirements. Minutes of such conferences will be kept and provided to all offerors who receive a copy of the request for proposal document.

3. Evaluation

Evaluation of proposals is generally performed by teams made up of members from the user agency and the Department of Administrative services. No contact with offerors will be made other than from the Department of Administrative Services. Offerors are barred from contact with the user agencies during the term of any proposal solicitation other than through the issuing authority (Department of Administrative Services).

During the evaluation phase discussions may be conducted with reasonable offerors who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal

treatment with respect to any opportunity for discussion and revision of proposals; and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions there shall be no disclosure of any information derived from proposals submitted by competing offerors.

4. Award

Awards shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposal document. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

SECTION 4 — Agency Contracts

Term Contracts usually established for one year by the Purchasing and Surplus Property Division for use by an individual State Agency or a specific group of agencies are referred to as "Agency Contracts." The sealed bid process is generally used to establish an Agency Contract; however, an informal bid process may be used if total purchases are estimated to be less than $5,000. In any event, the estimated requirements of the agency or agencies will be specified whenever possible but does not limit or restrict the amount to be purchased.

The State establishes three distinct types of Agency Contracts, which are termed "Open", "Fixed Quantity", and "Lease". "Open" contracts are supply contracts which do not obligate the User Agency to purchase any minimum quantity or limit the User Agency to any maximum quantity. "Fixed Quantity" contracts are supply

contracts which do obligate the User Agency to purchase a stated quantity. "Lease" contracts include all rentals, leases, or installment/purchases of equipment. After evaluation the Purchasing and Surplus Property Division will issue a Contract Notice of Award to the lowest responsible bidder. The Contract Award will include the terms, conditions, and item prices. On "Open" contracts, the Notice of Award does not authorize shipment of any supplies, materials, or equipment under the contract. Shipment is authorized only by the receipt of a Field Purchase Order Release issued by the User Agency.

SECTION 5 — Statewide Contracts

The Contracts established by the Purchasing and Surplus Property Division for use by all State agencies and/or all local political subdivisions are referred to as "Statewide Contracts". They are established in the same manner as Agency Contracts. The invitation to Bid will contain, whenever possible, estimates of the total requirements of the User Agencies. Upon evaluation of the bids the Division issues a Notice of Award to the lowest responsible bidder or bidders, and lists the new contract in the Contracts Catalogue. Certain items such as petroleum, concrete pipe, asphalt, typewriters, etc. are awarded by geographical area rather than for the entire State. As in the case of an Agency Contract, shipment of supplies, materials, or equipment is not authorized until receipt of a Field Purchase Order Release issued by a User Agency. All State Agencies are generally required to purchase from Statewide Contracts. Local governments are not required to do so, and any such purchases made by them are made at their sole option.

SECTION 6 — Open Market Purchases

The Purchasing and Surplus Property Division also purchases supplies, materials, and equipment on the open market (one time buy) without establishing a term contract for the supply of those items. The requirements for competitive bidding apply to these purchases; and upon award to the lowest responsible bidder, a State of Georgia Purchase Order is issued to the Vendor. Unlike Agency or Statewide Contracts, receipt of the Purchase Order by the Vendor authorizes shipment of the supplies, materials, or equipment to the Division or to the User Agency as designated by the Purchase Order. Receipt of such a Purchase Order does not authorize further sales of like supplies, materials, or equipment to any User Agency.

SECTION 7 — Scheduled Purchases

The Purchasing and Surplus Property Division establishes schedules for the combined bidding and one time purchase of certain commodities. Staple foods, for example, are purchased quarterly for all User Agencies. Agency requirements may be consolidated for delivery to a single F.O.B. point or each Agency's requirements may be listed separately for F.O.B. delivery to each agency. Scheduled purchases take the form of one-time, open market purchases awarded pursuant to competitive bidding for that period, with definite deliveries and quantities specified. State Purchase Orders are issued to the lowest responsive bidder or bidders meeting specifications.

SECTION 8 — Purchases from Other Governmental Agencies

The Purchasing and Surplus Property Division may, and in some cases must, make purchases from other state or

federal agencies, at set or negotiated prices. In such cases no competitive bids are solicited and private Vendors are precluded from making an offering to the State.

ARTICLE IV

PURCHASING TECHNIQUES AND AUTHORITIES — STATE AGENCIES

SECTION 1 — Competitive Bidding

When authority has been delegated to a State Agency to procure certain supplies, materials, equipment or services, the Agency must follow the applicable statutory rules for either informal or sealed competitive bidding. The agency will conduct the competitive bidding in much the same manner as the Purchasing and Surplus Property Division. However, Vendors are urged to familiarize themselves with the procedures used by each Agency with which they wish to do business.

SECTION 2 — Agency Small Value Purchase Authority

The authority to make Small Purchases has been delegated to individual State Agencies. A Small Value Purchase is defined as any purchase which involves a total expenditure of less than $5,000. Agencies may purchase any commodity under this authority up to their dollar limit ($500, $1,500 or $4,999 according to the agency), provided they seek competitive bids whenever possible for purchases between $500 — $4,999. Field Purchase Orders are issued by the User Agency to effect all Small Value Purchases.

SECTION 3 — Audited Purchase Authority

The Purchasing and Surplus Property Division has delegated to all State Agencies the authority to purchase products classified as perishables or "special items" and has delegated to selected Agencies authority to purchase technical instruments. The authority to purchase these particular items is referred to as "Audited Purchase Authority". These classified items are listed in the State Purchasing Manual and are available to all procurement officers upon request. The rules for competitive bidding apply to purchases made according to Audited Purchase Authority. Agencies issue Field Purchase Orders directly to the Vendor to effect purchases in these categories.

SECTION 4 — Emergency Purchases

In case of any emergency arising from unforeseen causes, State Agencies may request and receive Emergency Purchase Authorization allowing them to purchase, in the open market, the supplies, materials or equipment required for immediate delivery to that Agency. Such purchases must be made pursuant to the applicable competitive bid procedure whenever possible, and the Emergency Purchase Authorization Number must be shown on the Field Purchase Order.

SECTION 5 — Agency Purchases from Term Contracts

When an Agency wishes to acquire supplies, materials, or equipment covered by either an Open Ended, Agency or Statewide Contract, the agency issues a Field Purchase Order Release directly to the Vendor except in cases where special approvals are required. Receipt of the Field Purchase Order Release authorizes the Vendor to ship the items requested.

SECTION 6 — Agency Purchases from Other Governmental Agencies

State agencies have been authorized to purchase supplies, materials, or equipment from other governmental agencies at set or negotiated prices without competitive bidding. Private competition is precluded in all such acquisitions.

* * * *

ARTICLE VII

THE BIDDING PROCESS

SECTION 1 — Selection of Bidders; Advertisements

It is the policy of the State to give every approved bidder an equal opportunity to bid on procurements. Whenever possible, the Department makes every effort to issue an Invitation to Bid to every Vendor registered as a supplier of the commodity sought. In the event that the bid files contain a large number of qualified bidders and it is impractical to send an Invitation to each one, Invitations may be sent to a part of the list pursuant to a systematic rotation of the Vendor files. In addition to direct mail solicitation, the Purchasing and Surplus Property Division may publish a legal advertisement in a newspaper of statewide circulation when attempting to establish Agency, Statewide or Construction Contracts, or when purchasing in the open market for requirements in excess of $50,000.

SECTION 2 — Informal Written or Telephone Quotations

Informal written bids or, in some instances, telephone quotations may be solicited for purchases not exceeding

$5,000. Whenever possible, the informal written bid procedure will be used, rather than the telephone quotation. In those cases where time will not permit informal written bids, solicitations will be made by telephone. Vendors supplying telephone quotations should confirm the quotation in writing within 24 hours. The confirmation should be sent to the attention of the Buyer who solicited the quotation.

SECTION 3 — Sealed Bids

The Purchasing and Surplus Property Division is required by law to solicit sealed bids for acquisitions involving more than $5,000 whenever possible. Sealed bids may, however, be requested for any purchases regardless of the amount involved. The Invitation to Bid will indicate that the bids are to be received by the Division or by a State Agency on or before a specified date and hour. Each bid should be returned in a separate envelope or package; signed, sealed, and identified as follows:

From: Name of Vendor
Street or Box Number
City, State, Zip Code

Sealed Bid Opening Date: _____ Time: _____
Request No. _____
For State Department: _____
Purchasing Agent: _____

Bid Officer
Department of Administrative Services
200 Piedmont Avenue, S.E.
Floyd Building — West Tower Suite 1306
Atlanta, Georgia 30335

It is imperative that the Vendor place the Bid Opening Date, Hour, and the Request Number on the outside of the envelope since this is the only means by which the bid can be identified.

SECTION 4 — Invitation to Bid Form

The Invitation to Bid constitutes solicitations by the State for offers of goods or services, and should not be construed as offers by the State to make purchases.

The Bid form should be carefully completed by the Bidder, with all of the requested information supplied, and returned to the Division. A sample Invitation to Bid form may be found in Exhibit D.

SECTION 5 — Amending or Cancelling an Invitation to Bid

The State may withdraw or cancel an Invitation to Bid any time prior to the award of a contract. The State may amend an Invitation to Bid by issuing a notice of amendment to all bidders prior to bid opening. In unusual circumstances, the State may postpone a bid opening in order to notify Vendors of an amendment and to give them sufficient time to respond to the amendment.

SECTION 6 — Combining Bids

Separate Invitations to Bid may not be responded to by a combined bid quotation, and all bids submitted will be considered only for the purpose of the acquisition for which they were solicited.

SECTION 7 — Correspondence

All questions concerning a solicitation should be directed initially to the Buyer whose name and phone number is

indicated in the Invitation to Bid. Vendors should refer to the Invitation to Bid Number and the bid opening date when making an inquiry.

The Purchasing and Surplus Property Division cannot respond to inquiries concerning bid tabulations. This information is a matter of public record, and all bidders are invited to attend the public opening of bids or to inspect the public files after the award of the order in which they are interested.

Correspondence relating to purchases made directly by State Agencies should be directed to the Agency involved.

SECTION 8 — Terms, Conditions and Instructions

All Invitations to Bid are deemed to include the contract terms found in Part 2 of this **Manual**, and the procedures outlined in Part 1 of this **Manual**, as well as the terms, conditions and instructions included in the Invitation to Bid itself. The terms, conditions and instructions in the Invitation to Bid will vary with the type of purchase, market conditions, commodities or services requested, and may alter, amend or supersede the provisions in this **Manual**. These terms and conditions should be read carefully prior to the submission of any bid. Unless a specific exception is noted by the Bidder and accepted by the State, all provisions of the terms and conditions of the Invitation to Bid and all of the contract terms contained in Part 2 of this Manual will become a part of any contract awarded.

SECTION 9 — Vendor Address

All correspondence, including Notices of Award and release orders will be sent to the address appearing on the Vendor's bid form. If the Vendor wishes to have orders or

payments mailed to an address other than that shown on the face of the bid form, he should so indicate.

SECTION 10 — Certificate of Noncollusion-Signature on Bids

Every Invitation to Bid contains a certificate of noncollusion which must be signed by an authorized representative of the bidder. Such person shall include his title, and if requested, shall supply verification of his authority to bind his company in contract. This certificate is required by law, and failure to execute it will automatically result in a rejection of the bid.

SECTION 11 — Pricing and Discounts

Invitations to Bid request the quotation of the list price less all trade or other discounts offered, including cash discounts. Discount from list quotations may be requested for the supply of certain types of commodities. Instructions concerning this method of pricing will be included in the Invitation to Bid. The addition of price escalator clauses, minimum order requirements, or other additional pricing terms not included in the terms and conditions of the Invitation to Bid may cause the Bid to be rejected.

In all cases, if there is a discrepancy between the unit price and the extended price the unit price shall govern.

SECTION 12 — Discounts

Any cash discount offered to the State must be clearly shown in the space provided in the Invitation to Bid. All discounts offered will be taken when earned. Discounts of less than 20 days, however, will not be considered for the purpose of bid evaluation.

SECTION 13 — Taxes

State Taxes from which State Agencies are exempt:

- Sales and Use Tax
- Local Option Sales Tax
- MARTA Tax

State Taxes from which State Agencies **are not** exempt:

- Motor Fuel Tax
- 2nd Motor Fuel Tax

Federal Excise Taxes from which State Agencies are exempt:

- Communications (telephone & telegraph)
- Heavy Trucks, Trailers, and Tractors
- Tires
- Gasoline
- Gasohol
- Diesel Fuel
- Special Motor Fuels
- Firearms
- Ammunition
- Sport Fishing Equipment

Federal Excise Taxes from which State Agencies **are not** exempt:

- Transportation of Persons by Air
- Transportation of Property by Air
- Non Commercial Aviation Fuels
  - Gasoline
  - Fuels other than gasoline (including jet fuel)
- Gas Guzzler (except for law enforcement agencies)

SECTION 14 — Time of Performance

The number of calendar days required for delivery after receipt of a purchase order should be shown in the space provided on the bid form. The successful bidder should maintain or have available for his own use an inventory sufficient to make delivery within the time stated, or take whatever other measures may be necessary in order to insure that delivery will be made in accordance with the contract.

SECTION 15 — Specifications

Detailed specifications may not always accompany an Invitation to Bid. In some instances, reference will be made to certain standard specifications. Such a reference incorporates any such standard specifications in the Invitation to Bid, and any response to any such Invitation must then be in accordance with them.

In other cases, reference may be made to one or more brand names. Such reference is not restrictive unless otherwise specified and is used for descriptive purposes only. Bids on equivalent products of like quality and performance will be considered provided that the bid clearly and adequately describes the product and contains sufficient information to establish equivalence. The bidder should submit catalogue excerpts, specifications, or other materials suitable for use in the evaluation of the product offered. The Purchasing and Surplus Property Division will, in its sole discretion, determine whether a substitute offer is equivalent to the product or products specified. The Division may require the bidder to supply additional descriptive material, samples, or other proof if needed. Failure to supply this may result in rejection of the bid.

SECTION 16 — Samples

Samples of items, when required by the Division, must be furnished free of charge. Samples furnished will be returned upon request, at the bidder's expense, unless consumed in the examination or testing. Requests for the return of samples must be made within ten days after the award of the contract or purchase order. Each sample submitted must be clearly labeled, with the bidder's name, manufacturer's brand name and number, and the invitation to Bid number. Samples submitted by the successful bidder may, in some instances, be held for comparison with merchandise furnished and will not in such event be returned, until all of the merchandise ordered pursuant to the contract has been delivered.

SECTION 17 — Postage

Bidders are encouraged to carefully weigh and verify postage on all bids before mailing. The Purchasing and Surplus Property Division is not responsible for late delivery or non-delivery of the mails and does not accept bid packages with postage due. Please note that "Registered" and "Certified" mail does **not** receive "Special Delivery" type handling by the Postal Service.

SECTION 18 — Corrections

No erasure may be made on the bid forms. Prior to submission or bid opening, errors may be stricken and corrections entered, provided that any such strike-over or addition is initialed by the person signing the bid or his agent. No bid shall be altered or amended in any fashion after the bid opening. Negligence on the part of the bidder in preparing the bid confers no right to correct the bid after it has been opened.

SECTION 19 — Amendment or Withdrawal of a Bid

A bid may be amended or withdrawn by the bidder prior to the opening date and hour. After the bid opening, the Division may, in its sole discretion, permit withdrawal of a bid when the best interest of the State would be served. Generally, withdrawal will only be allowed in cases where a bidder has made an honest mistake not resulting from negligence. No amendment or withdrawal will be permitted after an award has been made.

SECTION 20 — Alternate Bids

Alternate bids may be considered when submitted in lieu of or in addition to, a bid for the goods or services requested. When alternate bids reveal that more economical supplies, materials, equipment, or services than those requested exist, the Purchasing and Surplus Property Division reserves the right to make an award to the alternate bidder. If the alternate bid suggests widescale modifications that would result in an obvious improvement, the Division may elect to cancel the bids and resolicit bids with modified specifications.

SECTION 21 — Late Bids

Bids must be received in the Purchasing and Surplus Property Division office on or before the date and hour designated for the bid opening. Telegraph or memorandum bids received before the date and hour designated for bid opening will be accepted provided written confirmation on an Invitation to Bid form is received within five days after the bid opening date. Bids received after the date and hour for opening will be rejected except in rare cases where the integrity of the sealed bidding process will not be compromised. Acceptance of any late bid will

be made in the sole discretion of the Purchasing and Surplus Property Division.

SECTION 22 — Bid, Performance, and Payment Bonds

Bid bonds are required by law for all construction contracts. They are also required on occasion by the Purchasing and Surplus Property Division. When they are required, the requirement will be stated clearly in the Invitation to Bid, and the bid bond must accompany the bid. Bids submitted without a bid bond may not be considered for award. All bid bonds, when required, are to be for a sum equal to five (5) percent of the total amount of the bid.

Payment and performance bonds are also required by law for all construction contracts in excess of $20,000. Performance bonds may also be required for other contracts at the discretion of the State, the requirement will be clearly stated in the Invitation to Bid. All payment and performance bonds must be in an amount equal to 100 percent of the total contract price.

Surety bonds are acceptable to the State. Cash bonds, including checks and certified checks, however, are not; and the Vendor should make arrangements prior to bidding for the issuance of any bond called for by the Invitation to Bid.

Bonds, when required, must be issued by a surety authorized to do business in the State of Georgia.

SECTION 23 — Confidentiality of Bids

All bids, whether sealed or unsealed, are confidential and will not be disclosed to the public or to any User Agency until, in the case of the sealed bids, they are read. All bids

will be open to public inspection after the award of the contract or purchase.

SECTION 24 — Open Specifications and Procedures

The Purchasing and Surplus Property Division endeavors to use open specifications and procedures that conform to accepted trade practices whenever possible. Vendors are requested to assist the Division by informing us whenever they feel that our specifications are not open or our procedures do not conform to accepted trade practices. Such information should be supplied as early as possible to allow time for any necessary corrections prior to the bid opening date.

ARTICLE VIII
EVALUATION OF BIDS AND AWARD

SECTION 1 — Rejection of Bids

The State of Georgia reserves the right to reject any and all bids submitted in response to any Invitation to Bid or to reject any portion of any bid or to waive any informality in any bid.

SECTION 2 — Acceptance Period

The Department of Administrative Services requires 30 days to evaluate bids for award. Bid offers which limit their acceptance period to less than 30 days, therefore, may be rejected. In the event that the Invitation to Bid does not state the period of time for which the Department requires bid offers to open, the offers shall be open for 30 days from the date of bid opening.

SECTION 3 — Award to the Lowest Responsible Bidder

Contracts or open market purchases will in all cases be awarded to the lowest responsible bidder. The lowest responsible bidder is deemed to be that bidder who submits a responsive bid which meets the specifications set out in the Invitation to Bid and which is most advantageous to the State, taking into account price, performance and capacity to perform of the bidder; quality of merchandise offered; transportation charges; and date of delivery. The lowest responsible bidder will not always be the bidder who has submitted the lowest monetary bid.

SECTION 4 — Split and Multiple Awards

Where more than one item is specified in an Invitation to Bid, the Purchasing and Surplus Property Division reserves the right to determine the lowest responsible bidder either on an overall basis, or on the basis of individual items or groups of items. Ordinarily, split awards will not be made unless the saving to the State exceeds five (5) percent of the total contract price. In no event will an award be split when savings to the State would be less than $200.

In some circumstances, when it is deemed to be in the State's best interest, the Purchasing and Surplus Property Division may make multiple awards for the supply of a commodity. Such awards allow the User Agencies to select those products which best suit their needs. Such awards are only made when it is not possible or practical to make a competitive low bid award.

SECTION 5 — Resolving Tie Bids

A tie bid exists when two or more bidders offer, at identical prices, products that meet all specifications, terms, and conditions. In such a situation State statutes provide three preferences which will be used to resolve tie bids whenever applicable: (1) preference to products manufactured or produced within the State of Georgia; (2) preference to products sold by local vendors within the State; and (3) preference to products manufactured or sold by small businesses. If these statutes are insufficient to resolve the tie, the following will be considered:

- Past performance of the bidders
- Total employment
- Division of the order
- Flip of the coin

SECTION 6 — Negotiation with Bidders

When bids received are unreasonable as to terms and conditions and the cost of delay outweighs the advantages of competitive rebidding, the Department of Administrative Services may negotiate with each responsive bidder to try to arrive at an acceptable contract. The need for negotiation also occurs many times in cases where the bids received are noncompetitive or where the low bid exceeds the available funds. In such cases, the negotiated price must be lower than the lowest original bid. All such negotiations will be carried out pursuant to the provisions of Georgia Laws 1979, 50-5-67(c) of the Official Code of Georgia Annotated.

SECTION 7 — Rebidding

If at any time during the bidding process it is found that the integrity of the process has been compromised or that

substantial errors have occurred in the bid solicitation, the Invitation to Bid will be cancelled and the procurement will be rebid.

SECTION 8 — Award Protest

The statutory criteria for award vests considerable discretion in the Purchasing and Surplus Property Division to consider factors other than price in the award process. The Purchasing Agent is responsible for evaluation and award to the lowest responsible bidder. Vendors who disagree with award decisions may document their positions in writing and request re-evaluation by the Senior Purchasing Agent concerned. If re-evaluation by the Senior Purchasing Agent does not resolve the disagreement, the Vendor may request evaluation of the record, including the written protest documentation, and may also request a hearing by the appropriate Section Supervisor. The evaluation by the Section Supervisor is normally sustained; however, in extreme and unresolved cases, the Vendor may request in writing an evaluation and hearing by the Director of the Purchasing and Surplus Property Division.

SECTION 9 — Price Increases/Decreases

The competitive bid concept is normally based on the quotation and acceptance of a firm price for a period of time. Term contracts, however, may in some cases contain a clause describing the conditions under which a price increase will be granted. Escalator clauses are, however, generally avoided. Vendors may take exception to the firm price provision in an Invitation to Bid if they wish, but such an exception will not be granted unless no firm price bids are received.

After award, all requests to increase prices must be in writing and addressed to the proper Purchasing and Surplus Property Division Contract Administrator. Each request must contain data establishing or supporting the general or industry-wide nature of the change. The Division will accept or reject all such requests within 30 days. No price increase may be granted unless the contract makes provision for such an increase. The State also requires that any announced price decrease be passed along to the State.

SECTION 10 — Contract and Assignment

A written purchase order or other notice of award mailed or otherwise furnished, to the successful bidder within the time of acceptance specified in the bid response results in a binding contract without further action by either party. This contract will incorporate by reference all of the contract terms listed in Part II of the Manual. Once awarded, the contract shall not be assignable in whole or in part without the express written consent of the Purchasing and Surplus Property Division.

SECTION 11 — Contract Renewal

Some contracts contain renewal clauses describing the conditions under which the contract issued from the Invitation to Bid may be renewed. No contract may be renewed unless it contains a renewal clause. The decision to renew will be made in the sole discretion of the Purchasing and Surplus Property Division pursuant to the provisions of the renewal clause.

SECTION 12 — Security Interest

By law, no Vendor may acquire a security interest in supplies, materials, or equipment sold to the State or any

agency, therefore, Vendors should not attempt to add security provisions to their contracts with the State.

SECTION 13 — Advisory Services

The State of Georgia is fully cognizant of the fact that service of an advisory or consultative nature is constructive, valuable to the agency, and generally costly to the Vendor. However, service of this type can only be regarded as normal sales effort, and no preferential recognition can be given to it in awarding contracts. Additionally, compensation for such services cannot be paid unless the provision of the services was the subject of a pre-existing contract.

Equipment provided and installed by a Vendor for the purpose of demonstration of functional capability, without an authorized written order, will not be given preferential recognition in contract awards. The State shall not be liable for any charges or costs incurred by Vendors for such equipment.

SECTION 14 — Foreign Made Goods

To be considered for award, foreign made goods must meet specifications, must be in stock in the continental United States, and must be available for immediate shipment at the time a Vendor submits his bid.

If foreign made machines or mechanical equipment are offered, such offer must be supported by evidence acceptable to the Purchasing and Surplus Property Division that adequate service locations, service personnel, and repair parts are available to the User Agency from stocks in the continental United States.

* * * *

Department of Administrative Services
Purchasing and Surplus Property Division

AGENCY PURCHASING MANUAL

Subject: Glossary

Section: I Page C1 [7]
Revision: 10/1/87

Purpose: To provide a reference to Terms and Abbreviations used in the APM

Approved: /s/

RESPONSIBILITY	ACTION
ABBREVIATIONS	MEANINGS
APM	Agency Purchasing Manual
APO	Agency Procurement Officer(s), and Agency Procurement Office(s), as certified and listed by P&S.
DOAS	Department of Administrative Services
EDP	Electronic Data Processing
FPO	Field Purchase Order(s)
FPOC	Field Purchase Order Correction(s)
GCC	Georgia Commodity Code(s)
MSLR	Maintenance, Service, Lease, Rental (Contracts)
PO	Purchase Order(s)
POC	Purchase Order Corrections(s)
PA	Purchasing Agent(s)
* P&S	Purchasing and Surplus Property Division
* RFP	Request for Proposal
* SAC	State Agency Contract
SPA	Senior Purchasing Agent(s)
SVA	Small Value Authority

RESPONSIBILITY	ACTION
SVA-NB	Small Value Authority — No Bids Required
SVA-CB	Small Value Authority — Competitive Bidding Required

TERMS	MEANINGS
AGENCY CONTRACT	A term contract, usually for one year, usually with one vendor contractor, for an item, for one user agency or specified group of agencies, usually where the exact usage is indeterminate. "Agency Contract" refers only to to those contracts issued by P&S and does not refer to field contracts issued by an agency for audited authority purchases or for SVA purchases. P&S uses five distinct types of Agency Contracts which are further defined as follows: (See Agency Field Contracts — Sections V-J,K,L,M)
	Agency Contract — Open — A supply contract which does not obligate the user to purchase any minimum quantity or limit the user to any maximum quantity. A Field Purchase Order is required to order from contract.

RESPONSIBILITY	ACTION
	NOTE: This type of contract is specifically reserved for P&S with the exception of term contracts let by the Agency for Special Audited Authority items that lend themselves to this type of contracting. A Field Purchase Order Release is required for ordering against the contract.
	Agency Contract — Fixed Quantity — A supply contract which does obligate the user to purchase a stated quantity.
	Agency Contract — Lease — Contracts for rental, lease or lease/purchase of equipment.

RESPONSIBILITY	ACTION
	Agency Contract — Service/Maintenance — A term contract issued to provide maintenance or other types of services.
	Agency Contract — Construction — A contract issued to accomplish a specified construction project.
AGENCY FIELD TERM CONTRACT	A term contract issued by an agency for Audited Authority or SVA purchases.
ALTERNATE	An item submitted by a vendor on a bid as an alternative to the requested and specified item for the consideration of the Purchasing Agent.
BID	An offer to sell made in response to an invitation to submit. Also, an invitation, solicitation, inquiry, or request to submit an offer to sell.
CONFIRMATION	Verification of the validity of a previous action; a confirmation order is usually the mailing to a vendor of a Purchase Order marked "Confirmation of an order already placed by phone — Do not duplicate" to provide the vendor with written, valid proof of the order.

RESPONSIBILITY	ACTION
CONSOLIDATED PURCHASE	Methods of purchasing whereby common, extended, or multiple requirements are consolidated into a single commitment, to a single vendor, etc., such as Statewide Contracts, Agency Contracts, Scheduled Buys, MSLR, etc.
CONSTRUCTION "CONTRACT"	The purchase of a requirement which will be met through the building or construction of something related to real property, usually regarded as "public works." A special kind of Open Market purchase usually handled as a project or job, and not regarded as a term contract in the sense of Statewide, Agency, or MSLR contracts.

RESPONSIBILITY	ACTION
AUDITED AUTHORITY	Authorities formally and specifically given over to the APO; Small Value Authorities and Emergency authorities are differentiated from Audited Authorities for clarification purposes; however, all such purchases are audited whether they are termed "Audited Authority" or "SVA-NB" or "SVA-CB."
EDP EQUIPMENT (Computer Equipment)	The following definitions are provided to clarify the meaning of this term as it is used in this manual: a. A computer system executes instructions based on an internally stored program. b. A computer system is capable of arithmetic and logical operation on data. c. The programming of a computer system is alterable by the user. d. A computer system is capable of expansion by the addition of peripherals. e. A computer system is used to acquire data, process data, or electronically store data for subsequent use.

Department of Administrative Services **Purchasing and Surplus Property Division**		**AGENCY PURCHASING MANUAL**
Subject:	Field Purchase Order procedures Audited Authority	Section: V Page B2 [69] Revision: 10/1/87
Purpose:	To provide procedures for processing purchases by item under audited agency authority using the Field Purchase Order	Approved:

RESPONSIBILITY	ACTION
	7. NOTES: 1. The following pages list the audited authority items currently in effect. (#) Denotes that competitive bids are not expected or may be very difficult to obtain due to the nature of the item, the purchasing circumstances, the market situation, or other restrictive conditions (See additional processing notes at the end of section). (*) Denotes that no FPO record copy or documentation is required (See Section V(1)).

RESPONSIBILITY	ACTION
	2. The "Audited Authority Numbers" to the immediate left of each item identify the specific authority using the prefix letter of each type of audited authority item and must be placed on the blank line next to the "Audited Authority No." line checked on the individual FPO for auditing purposes and data collection. For example, an FPO for the purchase of bread, rolls, cakes or pies would have the Audited Authority box checked and the audited authority number "P2051-000" noted on the line adjoining. Where an FPO covers items of different audited authority numbers, either list all numbers on the adjoining line, or the number of the predominant item with respect to the total dollar value.

RESPONSIBILITY	ACTION
	3. Any item listed as audited for purchase may also be leased by the Agency using the Standard Agency Lease Agreement. The Lease should be executed by the issuance of a FPO. The FPO should be completed in the same manner as for an audited purchase, and should have a copy of the lease attached.

Department of Administrative Services
Purchasing and Surplus Property Division

AGENCY PURCHASING MANUAL

Subject: Field Purchase Order procedures
Audited Authority

Section: V Page B7 [74]
Revision: Date: 10/1/87

Purpose: To provide procedures for processing purchases by item under audited agency authority using the Field Purchase Order

Approved:

RESPONSIBILITY **ACTION**

NOTE: Any service not listed to be purchased under SVA-Dollar authority. If service exceeds SVA-Dollar authority, pre-bid requisitions to be forwarded to state purchasing. See Exhibit X(E) for transmittal sheet form.

AUDITED AUTHORITY NUMBER	SERVICES (S)
7399-900	#Safe deposit rentals
4953-000	#Sewerage, environmental
7361-000	*#Sheep-shearing
8911-300	#Site planning and surveying
8299-100	*#Teaching and instructional services

4833-000	*#Television cable fees
7399-900	*#Theatrical and entertainment
7399-900	#Transit Insurance
7399-900	#Translating
4723-000	*#Transportation fares (Not for charted services)
4911-000	*#Utilities
7399-600	#Water Treating

Department of Administrative Services
Purchasing and Surplus Property Division

AGENCY PURCHASING MANUAL

Subject: Field Purchase Order Procedures Agency Field Term Contract - Services/Maintenance

Section: V Page L1 [117]
Revision: Date: 10/1/87

Purpose: To provide procedures for processing Agency Field Term Contracts - Service/Maintenance using the Field Purchase Order (FPO)

Approved: /s/

RESPONSIBILITY	ACTION
User	(1) Determines and transmits to the APO the unit's requirements.
	(1) Determines the user's exact needs regarding specifications, delivery, quality and propriety and that requirements fit the definition of "Service/Maintenance" contracts (Reference Section I(C)) and further that item is listed in Section V(B) under Audited Authority (if not listed go to step 6).

RESPONSIBILITY	ACTION
	(3) If criteria of paragraph 2 are met, obtains competitive prices, whenever possible, from the best available sources. If competition is not available the situation should be noted on the FPO record copy. (See Section V(I)).
	(4) Evaluates bids and determines winning vendor. Issues FPO (See Exhibit V(A)) to selected vendor for the specific requirements marking the "Audited Authority" box and entering the Audited Authority number in the space provided.
	(5) The FPO form should be completely filled out indicating the annualized contract cost in the Grand Total block. All applicable codes should be shown and a copy of the contract and bids taken should be attached to the FPO audit copies (See NOTE). All such FPO's should be batched under 2.1 — "Audited Authority" (Reference Exhibit V(I)).

RESPONSIBILITY	ACTION
	NOTE: Those items appearing in list of Audited Authority items in Section V(B) annotated by an asterisk (*) do not require submission of record copies to P&S.
	(6) If requirements meet the definition of "Service/Maintenance" contracts (Reference Section I(C)) and are not listed under "Audited Authority" items of Section V(B), but the annualized dollar volume falls under Agency's SVA limits competitive prices are obtained, whenever possible, from the best available sources. If competition is not obtainable the situation should be noted on the FPO record copy (See Section V(I)).

Department of Administrative Services Purchasing and Surplus Property Division	AGENCY PURCHASING MANUAL
Subject: Field Purchase Order Procedures Agency Field Term Contract - Services/Maintenance	Section: V Page L2 [118] Revision: Date: 10/1/87
Purpose: To provide procedures for processing Agency Field Term Contracts - Service/Maintenance using the Field Purchase Order (FPO)	Approved: /s/

RESPONSIBILITY	ACTION
	(7) Evaluates bids and determines winning vendor. Issues FPO (See Exhibit V(A)) to selected vendor for the specific requirements marking the "Agency Contract" box and entering the word "Field" in lieu of Agency Contract number.

RESPONSIBILITY	ACTION
	(8) The FPO form should be completely filled out indicating the annualized contract cost in the "Grand Total" block. All applicable codes should be shown and a copy of the contract and the bids taken should be attached to the FPO audit copies. All FPO's in this category should be batched under 1.2A — "Agency Field Term Contract" (Reference Exhibit V(1)).
NOTES:	(1) All special approval requirements shown elsewhere in the APM are applicable.
	(2) Use of this procedure does not eliminate requirement for taking competitive bids.
	(3) If annualized contract cost exceeds Agency's SVA limits requisitions shall be process to P&S for further processing. Pre-bid requisitions are acceptable for these types of contracts.

RESPONSIBILITY	ACTION
	(4) Any service (including maintenance service) that becomes a term contract and is annualized to be valued within the SVA Dollar Authority is to be purchased with an FPO as an Agency "FIELD" Contract and batched as a field contract with annualized amount. No other record copy to Purchasing and Supplies is necessary for the remainder of the contract term. If the term contract for service exceeds the SVA Dollar Authority, proposals are to be handled by Agency Procurement Officers. (Remember, over $5,000 must be a SEALED BID.) The recommended Vendor should sign the contract and the purchase requisition with bids and contract sent to Purchasing under "Pre-Bid Authority". The Purchase order signed by the State Purchasing Agent will consummate the contract with your Vendor.

OPINIONS OF THE ATTORNEY GENERAL
1974

Arthur K. Bolton
Attorney General

OPINION 74-16

To: Commissioner, Department of Administrative Services — January 25, 1974

Re: Purchasing and Supplies Division of the Department of Administrative Services must solicit bids for every purchase with certain exceptions; factors other than price must be considered in determining the lowest responsible bid; ultimate responsibility for determining acceptability based on functional application rests with the Purchasing and Supplies Division.

[Ga. Code Ann. Ch. 40-19 sections herein are based upon Ga. Laws 1937, p. 503 et seq., as amended.]

You have requested my official opinion with respect to three questions concerning the duties of the Department of Administrative Services through its Purchasing and Supplies Division (hereinafter DOAS) as the successor to the functions of the Supervisor of Purchases.

1. Does the law require the taking of bids without exception?

2. Must an award be made to the lowest bidder without consideration of factors other than price?

3. Does the authority to determine acceptability based on functional application rest with the Department of Administrative Services, with the user agency, or both?

1. Does the law require the taking of bids without exception?

Georgia Laws 1937, pp. 503, 508, as amended (Ga. Code Ann. § 40-1909), divides purchases made through DOAS into two categories: Those in excess of $1,000 and those for $1,000 or less. With respect to purchases in excess of $1,000, Ga. Code Ann. § 40-1909 provides that sealed bids shall be solicited by advertisement in a newspaper of statewide circulation, except that when DOAS finds some other method of advertisement to be more advantageous for the particular item to be purchased, the department may adopt such other method of advertisement. This requirement was construed by this office in Op. Att'y Gen. 69-297, a copy of which is attached hereto, to allow the solicitation of bids either by newspaper, or by written invitation to all known and qualified vendors as established by a list maintained by DOAS. I must point out, however, that while the latter procedure may be followed, DOAS is under a duty to exclude no competent vendor from the department's list, and also to seek out and discover, to the best of the department's ability, all sources of supply, giving all such vendors access to the established list. Ga. Code Ann. § 40-1902 (A). With respect to purchases in excess of $1,000, DOAS may, therefore, solicit bids in either manner set forth above, or in any other reasonable manner in view of the item to be purchased, but it is clear that bids must be solicited or advertised for in some manner reasonably calculated to reach all reasonably available sources of supply. Furthermore, the bids solicited must be written, sealed bids. Ga. Code Ann. §§ 40-1909, 40-1913.

With respect to purchases of $1,000 or less, Ga. Code Ann. § 40-1909 provides:

> "it shall be the duty of [DOAS] to solicit bids direct by mail from reputable owners of supplies."

Therefore, the department must canvass all known, or reasonably discoverable, reputable suppliers and solicit bids from them.

There are exceptions to the general requirement that bids must be solicited for all purchases by DOAS. First, Ga. Code Ann. § 40-1917 provides for purchases without the taking of bids if an emergency requires immediate purchase. Second, Ga. Code Ann. § 40-1924 empowers the department to establish standard specifications applying to state contracts. Ga. Code Ann. § 40-1910 directs the department to consider any such specifications in purchasing decisions. I am of the opinion that where only one product can meet the applicable specifications, there is no necessity to solicit bids from other suppliers of such products since this would be a useless act. Finally, of course, the same principles would apply when a product is available from one source only. This conclusion is confirmed by Ga. Code Ann. § 40-1910, which states that contracts shall be awarded on the basis of competitive bids "whenever possible."

However, I am also of the opinion that the proper execution of the duties of the department demands that it determine to the best of its ability that specifications (either those suggested by the requisitioning agency or those developed by DOAS) do not arbitrarily exclude potential vendors, and that no other vendor can in fact meet all applicable and reasonable specifications. Only when these duties are properly executed do the exceptions relating to available sources become operative so as to

allow the department to forego the requirement of bid solicitation.

2. Must an award be made to the lowest bidder without consideration of factors other than price?

It is my official opinion that this question should be answered in the negative. Georgia Code Ann. § 40-1910 states that when competitive bids have been solicited, contracts shall be awarded

> "to the lowest responsible bidder, taking into consideration the quality of the articles to be supplied and conformity with the standard specifications which have been established and prescribed, the purposes for which said articles are required, the discount allowed for prompt payment, the transportation charges and the date or dates of delivery specified in the bid."

This section clearly vests considerable discretion in the department to consider factors other than price, and, in fact, *directs* it to consider these factors. The Supreme Court of this state has held that the courts should not interfere in the exercise of such discretionary power unless it is manifestly abused. *J. C. Lewis Motor Co., Inc. v. Mayor & Council of Savannah,* 210 Ga. 591 (1954). In that case the court stated:

> "This is not a case where two or more dealers had placed bids for the furnishing of identical vehicles, but is one where a Ford dealer and a Chevrolet dealer had each submitted a bid for furnishing his product, the two bids in controversy covering different makes of automobiles, thus calling for a discretionary decision as to whether the difference in the products would justify the difference in price."

See also, *Watson v. City of East Point*, 223 Ga. 185 (1967). In *J. C. Lewis Motor Co., Inc. v. Mayor & Council of Savannah*, supra, the facts of the case indicated that there were demonstrable factors related to the performance of the vehicles purchased which justified the purchase, even in view of the higher price paid for those vehicles. Therefore, when DOAS can in good faith point to some demonstrable or real factor which justifies its conclusion that a higher dollar bid is nevertheless the "lowest responsible" bid, the department has properly exercised its discretionary power. However, if no such justification can be demonstrated by DOAS, an abuse of discretion would have occurred.

Furthermore, the phrase "lowest responsible bidder" has been almost unanimously construed by the courts of other jurisdictions to mean not merely "financially solvent," but also "responsible" with respect to the bidder's over-all ability to respond in quality and fitness to the particular requirements of the contract in question. E.g., *Culpepper v. Moore*, 40 So.2d 366 (Fla. 1949); *Hodgeman v. City of San Diego*, 53 Cal.App.2d 610, 128 P.2d 412 (1942); *Mitchell v. Walden Motor Co.*, 235 Ala. 34, 177 So. 151 (1937); *O'Brien v. Carney*, 6 F. Supp. 761 (D.C. Mass. 1934). However, once DOAS has considered all relevant factors, it must award the contract to the lowest bidder meeting its standards. DOAS may not award a contract to a higher bidder if the products are equal in view of all relevant factors.

3. Does the authority to determine acceptability based on functional application rest with the Department of Administrative Services, with the user agency, or both?

The process by which "acceptability based on functional application" is determined may be found in Ga.

Code Ann. § 40-1924, which section provides for the formulation of standard specifications. The ultimate responsibility for determining whether a product complies with such specifications lies with DOAS, as does the responsibility for making all ultimate determinations as to acceptability insofar as necessary to award a contract. However, the department is obligated to seek the advice, assistance, and cooperation of state agencies in order to ascertain their requirements. Ga. Code Ann. § 40-1924. Op. Att'y Gen. 1949, p. 570, a copy of which is attached hereto, deals with this question and remains an accurate expression of the opinion of the Attorney General on this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

No. 1:90-CV-1550-HTW

FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, and GEORGIA POWER COMPANY,

Defendants.

AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DAMAGES

NOW COMES Flint Electric Membership Corporation ("Flint EMC"), Plaintiff in the above-styled action, and respectively amends its Complaint as of right pursuant to Fed. R. Civ. P. 15(a) and shows the Court as follows:

INTRODUCTION

1.

Flint EMC is a Georgia corporation with its principal office and place of business in Reynolds, Georgia. Flint EMC is a nonprofit electric cooperative organized and existing under the Georgia Electric Membership Corporation Act.

2.

Defendant Bobby Whitworth is a citizen of the State of Georgia with his permanent residence in Georgia, and is subject to the jurisdiction of this Court. Commissioner Whitworth is and was at all times relevant to this Complaint the Commissioner of the Department of Corrections.

3.

Defendant Clyde Stovall is a citizen of the State of Georgia with his permanent residence in Georgia, and is subject to the jurisdiction of this Court. Mr. Stovall is and was at all times relevant to this Complaint the Assistant Commissioner, Facilities Development and Maintenance, of the Department of Corrections.

4.

Defendant Georgia Power Company is a corporation organized and existing under the laws of the State of Georgia, and is subject to the jurisdiction of this Court.

5.

These claims arise pursuant to U.S. Const. Amend. 14 (due process), 42 U.S.C.A. § 1983, Ga. Const. art. I, § 1, ¶ 1 (due process), Fed. R. Civ. P. 65 (injunction), Georgia State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-81, and Georgia's purchasing regulations and procedures. The Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1343(a)(3) and under principles of pendent jurisdiction.

6.

Venue is proper pursuant to 28 U.S.C.A. § 1391(b).

STATEMENT OF FACTS

7.

The Department of Administrative Services ("DOAS") is given the statutory authority in Georgia in some circumstances to delegate to State departments, institutions or agencies the authority to make purchases or enter into contracts.

8.

A state department, institution or agency authorized by the DOAS to make purchases or enter contracts must comply with DOAS rules, regulations, and procedures, including provisions of the Georgia Vendor Manual.

9.

When the DOAS delegates to a state entity authority to procure certain supplies, materials, equipment or services, the state entity is required under DOAS rules,

regulations and procedures to follow competitive bidding requirements, including the requirement that bids be awarded to the lowest responsible bidder.

10.

Flint EMC and Georgia Power are suppliers of electricity in the State of Georgia. Under provisions of the Georgia Territorial Electric Service Act (O.C.G.A. §§ 46-3-1 through 46-3-15), they are authorized to and do compete for certain new customers that meet a minimum kilowatt level and other requirements ("large load customers").

11.

A new prison to be constructed in Macon County, Georgia, is expected to qualify as a large load customer under the Territorial Act, and is therefore open to competition for the provision of electric service.

12.

The Department of Corrections is a state agency authorized by the DOAS to enter into an electric utility contract for this prison, the Macon County Correctional Institution ("Macon County Prison"). The Department of Corrections is required by law to comply with competitive bidding requirements with respect to electricity utility contracts, including awarding such contracts to the lowest responsible bidder.

13.

On or about March 1, 1990 the Department of Corrections received bids from Flint EMC and Georgia Power

for the provision of electric service to the Macon County Prison.

14.

Flint EMC's proposal for electric service to the Macon County Prison constituted the lowest responsible bid. Flint EMC's bid was substantially lower in both the cost per kilowatt hour and estimated annual operating costs. Under Flint EMC's bid, the electric bill for the Macon County Prison would be approximately $35,000 less during the first year of operation than under Georgia Power's bid. In all other respects, Flint EMC offered comparable or superior service to that offered by Georgia Power.

15.

As part of its process of evaluating the proposals, the Department of Corrections asked consulting engineers Rosser Fabrap International ("Rosser Fabrap") to review the proposals from Georgia Power and Flint EMC. After reviewing the proposals, Rosser Fabrap recommended Flint EMC because of its lower operating costs and superior service. A true and accurate copy of Rosser Fabrap's March 19, 1990 letter recommending Flint EMC is attached hereto as Exhibit "A" and incorporated herein by reference.

16.

Notwithstanding the fact that Flint EMC was the lowest responsible bidder and was recommended by the independent consulting engineer, Defendants Stovall and Whitworth decided to award the contract for electric

service for the Macon County Prison to Georgia Power. Flint EMC was informed of this decision by letter dated March 28, 1990, from Mr. Stovall. Mr. Stovall did not state the reasons for the decision.

17.

Subsequently, Flint EMC obtained a copy of a memorandum dated March 28, 1990, from Defendant Stovall addressed to Defendant Whitworth, in which Mr. Stovall stated his purported reasons for recommending that Georgia Power be chosen as electric supplier for the Macon County Prison. The memorandum reflects Mr. Whitworth's approval of Mr. Stovall's recommendation.

18.

Mr. Stovall's March 28 memorandum acknowledged that Flint EMC had submitted the lower bid. Additionally, no finding was made that Flint EMC was not a responsible bidder or could not perform the electric service contract.

19.

In a letter dated May 14, 1990 addressed to Commissioner Whitworth, Flint EMC protested the choice of electric supplier for Macon County Prison and requested that the decision be reconsidered. Flint EMC demonstrated that the purported considerations set forth in the March 28 memorandum were not communicated to Flint ECM prior to the award of the bid, and were irrelevant, invalid, unsupported, erroneous and/or arbitrary. A true and accurate copy of the Flint EMC's May 14 letter is

attached hereto as Exhibit "B" and incorporated herein by reference.

20.

By letter dated May 18, 1990, Commissioner Whitworth summarily rejected Flint EMC's request for reconsideration.

Count One — Injunctive Relief for Violation of Due Process

21.

Plaintiff realleges and incorporates Paragraphs 1 through 20.

22.

Flint EMC submitted a bid that met the specifications for electric service for the Macon County Prison.

23.

Flint EMC complied with the procedural prerequisites for submitting a bid to the Department of Corrections for Macon County Prison.

24.

Flint EMC was the lowest responsible bidder for supplying electric service to Macon County Prison.

25.

Flint EMC, as lowest responsible bidder, had a protected property interest under Georgia law.

26.

Defendants Stovall and Whitworth wrongfully selected Georgia Power, instead of Flint EMC, as electric supplier for the Macon County Prison, in violation of Flint EMC's due process rights.

27.

In awarding the contract for electric service to Georgia Power instead of Flint EMC, Defendants Stovall and Whitworth engaged in a bidding process tainted with preaward improprieties, including but not limited to failing to communicate to Flint EMC criteria subsequently relied upon, informing Flint EMC that at least one factor relied upon would not be a consideration, considering at least one statement from Georgia Power that was made improperly and outside the bidding process, and disregarding the recommendation of the independent consultant for no valid reason. These actions of Defendants Stovall and Whitworth violated Flint EMC's due process rights.

28.

In awarding the contract for electric service to Georgia Power instead of Flint EMC, Defendants Stovall and Whitworth violated Flint EMC's due process rights by relying on mistakes of fact, invalid and unsupported assumptions, criteria predesigned to favor Georgia Power, criteria not reasonably related to the provision of

electric service, and arbitrary considerations applied in an arbitrary manner.

29.

In awarding the contract for electric service for the Macon County Prison to Georgia Power instead of Flint EMC, Defendants Stovall and Whitworth abused their discretion, exercised their authority in an arbitrary manner, and exceeded the scope of their authority, in violation of Flint EMC's due process rights.

30.

Defendants Stovall and Whitworth had no reason not to award the contract for electric service to Flint EMC and their reasons for awarding it to Georgia Power were invalid.

31.

The conduct of Defendants Stovall and Whitworth as described above was under color of state laws.

32.

Flint EMC has no adequate remedy at law and the balance of the equities favors Flint EMC.

Count Two — Damages for Violation of Due Process

33.

Plaintiff realleges and incorporates Paragraphs 1 through 32.

34.

As a result of the actions of Defendants Stovall and Whitworth acting in their individual capacities, Flint EMC has been damaged in an amount to be proved at trial.

35.

Flint EMC is entitled to an award of damages against Defendants Stovall and Whitworth individually, in an amount to be proved at trial.

Count Three — Damages for Violation of State Law

36.

Plaintiff realleges and incorporates Paragraphs 1 through 35.

37.

The award of the electric service contract by Defendants Whitworth and Stovall to Georgia Power, instead of to Flint EMC, constitutes a violation of the State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-81, and the procedures of the Georgia Vendor Manual.

38.

As a result of the actions of Defendants Stovall and Whitworth, Flint EMC has been damaged in an amount to be proved at trial.

39.

Flint EMC is entitled to an award of damages against Defendants Stovall and Whitworth individually, in an amount to be proved at trial.

WHEREFORE, Flint EMC requests a jury trial on the issues which can be determined by a jury and prays for the following relief:

1. That the Court preliminarily and permanently enjoin performance of the Department of Corrections-Georgia Power contract for electric service to the Macon County Prison;

2. That the Court rescind the Department of Corrections-Georgia Power contract for electric service for the Macon County Prison;

3. That the Court preliminarily and permanently award the contract for electric service for the Macon County Prison to Flint EMC;

4. That Flint EMC be awarded damages against Defendants Stovall and Whitworth individually under Flint EMC's § 1983 claim in an amount to be proved at trial;

5. That Flint EMC be awarded damages under Flint EMC's state law claim against Defendants Stovall and Whitworth individually in an amount to be proved at trial;

6. That all costs of this action be charged against the Defendants;

7. That Flint EMC be awarded its reasonable attorneys' fees as part of its costs, pursuant to 42 U.S.C.A. § 1988; and

8. That the Court grant such other and further relief as it deems just and proper.

/s/ James A. Orr
James A. Orr
State Bar No. 554608

/s/ Kathy R. Bess
Kathy R. Bess
State Bar No. 055760

Attorneys for Plaintiff

PAUL, HASTINGS, JANOFSKY
& WALKER
Forty-Second Floor
133 Peachtree Street, NE
Atlanta, Georgia 30303

EXHIBIT A

ROSSER FABRAP

March 19, 1990

Mr. Robert May
Georgia Department of Corrections
Floyd Veterans Memorial Building
Room No. 756 — East Tower
Atlanta, GA 30334

Re: Macon Co. Georgia
RF No. 00257.00

Dear Mr. May:

We have reviewed the information that you have sent to us from Georgia Power Company and Flint EMC (FEMC). The following is a summary of the information contained in each proposal.

I. Method of Service

A. Georgia Power

1. GPC proposes two separate tap lines, each from separate transmission sources (one from the Gaillard 230/46 KV substation and the other from the American Cyanamid tap served out of the Americus Primary 115/46 KV substation) each terminating into a 46/12 KV pad mount transformer. The pad mounted transformers would feed an automatic or manual transfer switch which in turn would feed the new prison.

B. Flint EMC

1. FEMC proposes two transmission sources (the Americus 115/46 KV substation and the Gaillard 230/46 KV substation). These transmission sources would feed three substations (proposed 46/12 KV substation, Oglethorpe 46/12 KV substation and Whitewater 46/12 KV substation). Whitewater 46/12 KV substation would back-up the Oglethorpe 46/12 KV substation to provide one incoming feeder to an automatic transfer switch and the new 46/12 KV substation would provide a second incoming feeder, which in turn would serve the new facility.

II. Operating Costs

A. Georgia Power

1. GPC Rate PLL-1 showed that the annual bill under this rate would be $280,843 with an average cost of 5.63¢ per KWH.

B. Flint EMC

1. FEMC Schedule LIS-8 Large Industrial Service showed that the annual bill under this schedule would be $178,704.22 with an average cost of 5.15¢ per KWH.

III. Rate Increases

A. Georgia Power

1. GPC is making payments to Oglethorpe Power Corporation (OPC) which are decreasing each year. This means lower debts for GPC and less revenue for OPC.

2. Georgia Public Service Commission regulates GPC's ability to change their power rates.

B. Flint EMC

1. OPC sources of capital have lower financing costs due to strong credit ratings. These lower costs enable OPC to reduce the impact of future investments on future rates.

2. OPC shows consistently higher bond ratings from Moody's Rating Service and Standard and Poor's Rating Service through 1988.

3. OPC has generation capacity that is young and not heavily dependent on high sulfur coal. This means that they will not have large expenditures in plant renovation and will not be greatly affected by environmental legislation.

4. By 1996 OPC estimates that it will earn $250,000,000 margins by selling Plant Vogtle power back to GPC. All of these margins are used to directly lessen the impact of rising future rates.

5. A $21,000,000 contingency fund was established by OPC to pay for possible overruns of construction cost for Plant Vogtle. This was not needed for construction and will be applied to lower future rates.

IV. Outage History

A. Georgia Power

1. Butler-Americus 46 KV line was out for 16 minutes in 1987, 1 hour 20 minutes in 1988 and 20 minutes in 1989.

2. Americus-Gaillard 46 KV line was out 1 hour 24 minutes in 1987, did not show figures for 1988 (possibly because there may not have been an outage in 1988) and 14 minutes of outage were recorded in 1989.

B. Flint EMC

1. Americus 46 KV bus was out for 25 minutes in 1987, no outage in 1988 and no outage in 1989.

2. Oglethorpe 46/12 KV substation was out 25 minutes 35 seconds in 1987, 21 minutes 53 seconds in 1988 and 56 minutes 12 seconds in 1989.

3. Whitewater 46/12 KV substation was out 8 seconds in 1987, 2 hours 26 minutes 30 seconds in 1988 and no data shown in 1989.

V. **Maintenance**

A. Georgia Power

1. Have 11 troublemen, (2) 3-man distribution crews, (2) 3-man distribution crews within 60 minutes of the site.

2. Storm Evaluation and Restoration Procedures (SERP) when additional resources and manpower are needed.

B. Flint EMC

1. 31 certified substation operators.

2. Headquarters 22 miles from the site.

3. 24-hour radio dispatch.

4. Underground and overhead crews on standby 24 hours a day.

5. Division manager of external operations lives within three miles of site.

6. 83 radio-dispatched vehicles.

7. Centralized control center.

8. Statewide support from 41 other EMC's and electrical contractors.

9. Supervisory Control and Data Acquisition System (SCADA) of the proposed substation and the Oglethorpe substation.

Based on the following assessments of the above five areas of evaluation, we recommend that Flint EMC provide electrical service to Macon County Correctional Institution:

I. Method of Service — Both utilities offer the advantage of automatic transfer in case of primary failure. FEMC offers the advantage of two substations (Oglethorpe 46/12 KV substation and Whitewater 46/12 KV substation) serving one of the feeders to the automatic transfer switch and a new substation serving the other incoming feeders to the automatic transfer switch.

II. Operating Costs — The annual cost of electricity can not be compared because different figures were used by each utility company to arrive at these numbers. However, the amount per KWH submitted by GPC was 5.63¢ per KWH and 5.15¢ by FEMC. This was a slight advantage offered by FEMC.

III. Rate Increases — It appeared that FEMC presented more data to support their claim of keeping their rates lower over the next few years.

IV. Outage History — There doesn't seem to be a clear choice of either utility in this area.

V. Maintenance — GPC appears to have more manpower beyond the local level but FEMC appears to have the advantage of more manpower at the local level. In addition, FEMC has an advantage by having an electronic monitoring system to provide an automatic warning whenever the proposed substation or the Oglethorpe substation has an alarm condition.

Please don't hesitate to contact us if there are any further questions.

Sincerely,

/s/ Ron Blazina

Ron Blazina

RB:san

pc: Kerry Nickerson
Rich Wilinski
File 2.1.3 (00257.00)
Reading File

EXHIBIT B

FLINT ELECTRIC MEMBERSHIP CORPORATION
P.O. Box 308
Reynolds, Georgia 31076-0308
(912) 847-3415

May 14, 1990

Mr. Bobby K. Whitworth, Commissioner
Georgia Department of Corrections
Floyd Veterans Memorial Building
Room 756 - East Tower
Atlanta, Georgia 30334

RE: Macon Correctional Institution
Customer Choice Selection of
Electrical Supplier

Dear Mr. Whitworth:

Flint Electric Membership Corporation has reviewed the memorandum dated March 28, 1990 concerning the choice of the electrical supplier for the Macon County Prison facility.

Our review indicates that there are significant, inaccurate statements which, if accurately reflected, would change the conclusion of the power supplier for the service at the Macon County facility.

The purpose of this letter is to point out these areas and to provide you with the correct and accurate information.

It was stated in the memorandum that "the various EMC's operate as independent, small electric companies under the umbrella of cooperative membership with Oglethorpe Power Corporation." It is correct that the various EMCs are independent electric utilities; however, Flint

and many of the other EMCs are not small. None of the EMCs are under the umbrella of Oglethorpe Power Corporation.

Each EMC in the State is locally owned and operated with Flint Electric Membership Corporation serving some 15 counties across the middle of the State from Columbus to the Ocmulgee River including the City of Warner Robins. Flint, in the spirit of a cooperative, has always been very receptive to the problems and needs of the consumers because these consumers are the owners. As a consumer, your facility would have the highest priority available from Flint's Service Department. Not only are Flint's service personnel located in the area in which they serve, but also the Board of Directors and Management live within the service area and would certainly be more responsive to any local concern or problem you might have than some disinterested party located in Atlanta.

The following quotation appears in the memorandum "the Department of Corrections in day to day activities would have to deal with individual companies about individual problems when working with EMCs and when working with our facility." This quotation seems to imply that local problems are solved in Atlanta rather than on site by competent personnel. We certainly feel that such an inference is incorrect and that the Macon County facility problems would be solved better, quicker and easier on site if served by Flint Electric Membership Corporation.

With reference to the fourth paragraph, Mr. Stovall is right in stating that the EMCs are a non-profit organization and that they are controlled and operated by a Board of Directors. There is no reason for an EMC to have a margin (profit) and if they do then it is returned

to those who have used the power. The power company, on the other hand, has a guarantee of 16-18% return on its investment. Therefore, it stands to reason that their rates must reflect this extra cost.

For your information Flint Electric Membership Corporation has the lowest rates of any cooperative in Georgia that buys its power from Oglethorpe Power Corporation and lower than Georgia Power Company. Your organization could have saved approximately $35,000 per year by choosing Flint Electric Membership Corporation and, in my opinion, that is no small amount of our tax dollars. Further, the inference left by reading this paragraph is that Georgia Power Company will provide lower rates because they are under the Public Service Commission. This is not true. Historically, Flint Electric Membership Corporation's rates have been lower than Georgia Power Company's.

We strongly disagree with the statement that "Georgia Power Company is the better choice in an electrical supplier from the standpoint of an overall electrical service." Georgia Power Company and Oglethorpe Power Company jointly generate and jointly transmit over the Integrated Transmission System all the electric power that will be used at the facility in Macon County or any facility throughout the State. The power which is generated and transmitted on these jointly owned facilities is the same when delivered at the substation.

The reference to restoration of service is, in our opinion, clearly distorted. Flint Electric Membership Corporation has 24-hour, 7-day dispatch with crews on standby at all times. Consequently, any need for maintenance is no more than a phone call away. Flint certainly has more people in the Macon County area to do maintenance work

by far than Georgia Power Company. We agree that continuity of service is vital to this type of service and I can assure you that Flint has the personnel to provide that with greater reliability than Georgia Power Company. This fact is shown by the fact that Flint Electric Membership Corporation has increased personnel and Georgia Power has decreased personnel in the Macon County area. We agree the "being there when you really are needed" is important and that has always been Flint's motto and reputation.

We agree with the statement that maintenance of the underground facility and the high-mast lighting are two very important conditions. We feel that we have maintenance crews that are highly trained in maintaining an underground facility since Flint Electric Membership Corporation has over 500 miles of underground facilities serving homes, commercial businesses, hospitals and shopping centers. As for the high-mast lighting, we have been asked to install high-mast lighting at the intersection of Thompson Road and I-75 by the D.O.T.

Referencing the attachments to the Macon County facility on the reliability, the data shown appears to reflect that outage data supplied by Flint Electric Membership Corporation was much greater than data supplied by Georgia Power Company. After Georgia Power Company was chosen as the supplier we were able to obtain a copy of Georgia Power Company's proposal which shows outage information supplied by Flint Electric was based on instantaneous and Georgia Power based their information on outages greater than 10 seconds. The truth of the matter is, the outage information should have been the same since each party is served by the same source.

Concerning the cost of electricity, we agree totally with Mr. Stovall's figures. Where we are confused is why you could not accept Flint Electric Membership Corporation's much lower rate.

Talking about future electrical costs, no one has any idea what the future holds nor can we predict what will come in the future. But, looking to the past, Georgia Power Company has had an average 8.9% per year and Flint Electric Membership Corporation an average 3.1% per year increase since 1985.

With regard to the method of service, Mr. Stovall stated that the "proposal from Flint EMC proposes a second alternate feeder, (basically a third manually transferred feeder)". This is not true. Flint Electric's alternate feed would be an automatic transfer rather than a manual transfer as indicated.

As far as service is concerned, we feel that we have adequate people in the area, some of whom live in the Montezuma-Oglethorpe area. The large industrial load of Proctor and Gamble located directly across the road from your facility, has been served by Flint for over ten (10) years. Certainly these people would verify the fact that our service is second to none. With reference to the fact that Georgia Power Company has had to assist us with service is totally incorrect. The fact is just the opposite. We have performed switching operations for them on numerous occasions because of the lack of personnel in the area.

In reference to the letters of support which Georgia Power Company supplied to you, we were advised not to solicit letters of support. However, had we known this would be considered we would have been able to provide you with many. Our Engineer gave you the name of the

Engineer at Proctor and Gamble to substantiate our reliability. We learned that he was never contacted concerning Flint's service reliability.

It was also stated that Ocmulgee EMC has serviced the existing facility at the Dodge Corrections Institute with excellent service since the facility's construction. We are not surprised by this statement. However, when comparing statistics, as shown by the service provided by Ocmulgee EMC, we know that if Ocmulgee EMC can do it, then Flint EMC can do it even better:

	Ocmulgee EMC	Flint EMC
Number of Members	6,834	45,000
Miles of line	1,342	4,100
Employees	36	180

In conclusion, I think it is readily apparent that a great deal of confusion may have been involved in the analytical process. We certainly hope this letter will clarify some of that confusion. We also feel that in light of this rather contradictory information that it would be in the best interest of all parties concerned that this issue by [sic] re-evaluated. Therefore, please accept this letter as a formal request for reconsideration. Since we understand that time is of the essence for the Department of

Corrections, we hope to hear from you within the next few weeks.

Sincerely,

Harold B. Smith
General Manager

HBS/jy
CC: Mr. Clyde D. Stovall
Assistant Commissioner
Facilities Development & Maintenance
Georgia Department of Corrections

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA [SIC]

CIVIL ACTION FILE

No. 1:90-CV-1550-HTW

FLINT ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff,

versus

DEPARTMENT OF CORRECTIONS, BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, and GEORGIA POWER COMPANY,

Defendants.

VERIFICATION

Personally appeared before the undersigned officer, Harold B. Smith, who states upon oath that he is the Manager of Flint EMC, and states that the facts set forth in the foregoing amended complaint are true and accurate to the best of his knowledge and belief.

This 31st day of August, 1990.

/s/ Harold B. Smith
Harold B. Smith

Sworn to and subscribed
before me, this 31st
day of August, 1990
/s/ Marion N. Helms
Notary Public
My Commission Expires
3-27-91

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the within and foregoing AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DAMAGES by placing a copy of same in the United States mail in a properly addressed envelope with adequate postage affixed thereon to ensure delivery to:

Robert P. Edwards, Jr., Esq.
Troutman, Sanders, Lockerman
& Ashmore
1400 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

William F. Amideo
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 7 day of September, 1990.

/s/ James A. Orr
James A. Orr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:90-CV-1675-JOF

PATAULA ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff,

v.

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, and GEORGIA POWER COMPANY,

Defendants.

AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DAMAGES

NOW COMES Pataula Electric Membership Corporation ("Pataula EMC"), Plaintiff in the above-styled action, and respectively amends its Complaint as of right

pursuant to Fed. R. Civ. P. 15(a) and shows the Court as follows:

INTRODUCTION

1.

Pataula EMC is a Georgia corporation with its principal office and place of business in Cuthbert, Georgia. Pataula EMC is a nonprofit electric cooperative organized and existing under the Georgia Electric Membership Corporation Act.

2.

Defendant Bobby Whitworth is a citizen of the State of Georgia with his permanent residence in Georgia, and is subject to the jurisdiction of this Court. Commissioner Whitworth is and was at all times relevant to this Complaint the Commissioner of the Department of Corrections or the Deputy Commissioner of the Department of Corrections. Mr. Whitworth's predecessor as Commissioner of the Department of Corrections was David C. Evans.

3.

Defendant Clyde Stovall is a citizen of the State of Georgia with his permanent residence in Georgia, and is subject to the jurisdiction of this Court. Mr. Stovall is and was at all times relevant to this complaint the Assistant Commissioner, Facilities Development and Maintenance, of the Department of Corrections or the Director, Facilities Development and Maintenance, of the Department of Corrections.

4.

Defendant David C. Evans is a citizen of the State of Georgia and is subject to the jurisdiction of this Court. Mr. Evans was Commissioner of the Department of Corrections at times relevant to this complaint.

5.

Defendant Georgia Power Company is a corporation organized and existing under the laws of the State of Georgia, and is subject to the jurisdiction of this Court.

6.

These claims arise pursuant to U.S. Const. Amend. 14 (due process), 42 U.S.C.A. § 1983, Ga. Const. art. I, § 1, ¶ 1 (due process), and Fed. R. Civ. P. 65 (injunction), Georgia State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-81, and Georgia's purchasing regulations and procedures. The Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1343(a)(3) and under principles of pendent jurisdiction.

7.

Venue is proper pursuant to 28 U.S.C.A. § 1391(b).

STATEMENT OF FACTS

8.

The Department of Administrative Services ("DOAS") is given the statutory authority in Georgia in some circumstances to delegate to State departments, institutions or agencies the authority to make purchases or enter into contracts.

9.

A state department, institution or agency authorized by the DOAS to make purchases or enter contracts must comply with DOAS rules, regulations, and procedures, including provisions of the Georgia Vendor Manual.

10.

When the DOAS delegates to a state entity authority to procure certain supplies, materials, equipment or services, the state entity is required under DOAS rules, regulations and procedures to follow competitive bidding requirements, including the requirement that bids be awarded to the lowest responsible bidder.

11.

Pataula EMC and Georgia Power are suppliers of electricity in the State of Georgia. Under provisions of the Georgia Territorial Electric Service Act (O.C.G.A. §§ 46-3-1 through 46-3-15), they are authorized to and do compete for certain new customers that meet a minimum kilowatt level and other requirements ("large load customers").

12.

A new prison to be constructed in Calhoun County, Georgia, is expected to qualify as a large load customer under the Territorial Act, and is therefore open to competition for the provision of electric service.

13.

The Department of Corrections is a state agency authorized by the DOAS to enter into an electric utility contract for this prison, the Calhoun County Correctional Institution ("Calhoun County Prison"). The Department of Corrections is required by law to comply with competitive bidding requirements with respect to electric utility contracts, including awarding such contracts to the lowest responsible bidder.

14.

On or about April 10, 1989, the Department of Corrections received bids from Pataula EMC and Georgia Power for the provision of electric service to the Calhoun County Prison.

15.

Pataula EMC's proposal for electric service to the Calhoun County Prison constituted the lowest responsible bid. Pataula EMC's bid was substantially lower in both the cost per kilowatt hour and estimated annual operating costs. Under Pataula EMC's bid, the electric bill for the Calhoun County Prison would be approximately $35,000 less during the first year of operation than under Georgia Power's bid. Additionally, Pataula EMC's bid would save the Department at least $16,800 a year in equipment leasing costs during the first ten years and at least $57,600 a year thereafter. In all other respects, Pataula EMC offered comparable or superior service to that offered by Georgia Power.

16.

As part of its process of evaluating the proposals, the Department of Corrections asked consulting engineers Rosser Fabrap International ("Rosser Fabrap") to review the proposals from Georgia Power and Pataula EMC. After reviewing the proposals, Rosser Fabrap recommended Pataula EMC because of its lower operating costs and lower lease cost. A true and accurate copy of Rosser Fabrap's August 16, 1989 letter recommending Pataula EMC is attached hereto as Exhibit "A" and incorporated herein by reference.

17.

Notwithstanding the fact that Pataula EMC was the lowest responsible bidder and was recommended by the independent consulting engineer, Defendant Whitworth recommended that the contract for electric service for the Calhoun County Prison be awarded to Georgia Power. Defendant Evans, then Commissioner of the Department of Corrections, approved the award of the contract as recommended. The memorandum reflects Commissioner Evans' approval of electric suppliers as recommended by Mr. Whitworth. Pataula EMC was informed of this decision by letter dated October 16, 1989, from Mr. Stovall. Mr. Stovall did not state the reasons for the decision.

18.

Subsequently, Pataula EMC obtained a copy of a memorandum dated September 12, 1989, from Defendant Stovall via Defendant Whitworth and addressed to then Commissioner Evans, in which Mr. Stovall and Mr. Whitworth stated their purported reasons for recommending

that Georgia Power be chosen as electric supplier for the Calhoun County Prison.

19.

Mr. Stovall and Mr. Whitworth's September 12 memorandum acknowledged that Pataula EMC had submitted the lower bid. Additionally, no finding was made that Pataula EMC was not a responsible bidder or could not perform the electric service contract. Additionally, the purported considerations set forth in the September 12 memorandum were not communicated to Pataula EMC prior to the award of the bid, and were irrelevant, invalid, unsupported, erroneous and/or arbitrary.

Count One — Injunctive Relief for Violation of Due Process

20.

Plaintiff realleges and incorporates Paragraphs 1 through 19.

21.

Pataula EMC submitted a bid that met the specifications for electric service for the Calhoun County Prison.

22.

Pataula EMC complied with the procedural prerequisites for submitting a bid to the Department of Corrections for Calhoun County Prison.

23.

Pataula EMC was the lowest responsible bidder for supplying electric service to Calhoun County Prison.

24.

Pataula EMC, as lowest responsible bidder, had a protected property interest under Georgia law.

25.

Defendants Evans, Stovall and Whitworth wrongfully selected Georgia Power, instead of Pataula EMC, as electric supplier for the Calhoun County Prison, in violation of Pataula EMC's due process rights.

26.

In awarding the contract for electric service to Georgia Power instead of Pataula EMC, Defendants Evans, Stovall and Whitworth engaged in a bidding process tainted with pre-award improprieties, including but not limited to failing to communicate to Pataula EMC criteria subsequently relied upon, failing to consider significant cost factors regarding the lease of equipment, and disregarding the recommendation of the independent consultant for no valid reason. These actions violated Pataula EMC's due process rights.

27.

In awarding the contract for electric service to Georgia Power instead of Pataula EMC, Defendants Stovall and Whitworth violated Pataula EMC's due process rights by relying on invalid and unsupported assump-

tions, criteria predesigned to favor Georgia Power, criteria not reasonably related to the provision of electric service, and arbitrary considerations applied in an arbitrary manner and by failing to consider significant cost factors relating to the lease of equipment.

28.

In awarding the contract for electric service for the Calhoun County Prison to Georgia Power instead of Pataula EMC, Defendants Evans, Stovall and Whitworth abused their discretion, exercised their authority in an arbitrary manner, and exceeded the scope of their authority, in violation of Pataula EMC's due process rights.

29.

Defendants Evans, Stovall and Whitworth had no reason not to award the contract for electric service to Pataula EMC and their reasons for awarding it to Georgia Power were invalid.

30.

The conduct of Defendants Evans, Stovall and Whitworth as described above was under color of state law.

31.

Pataula EMC has no adequate remedy at law and the balance of the equities favors Pataula EMC.

Count Two — Damages for Violation of Due Process

32.

Plaintiff realleges and incorporates Paragraphs 1 through 31.

33.

As a result of the actions of Defendants Stovall, Whitworth, and Evans acting in their individual capacities, Pataula EMC has been damaged in an amount to be proved at trial.

34.

Pataula EMC is entitled to an award of damages against Defendants Stovall, Whitworth, and Evans individually, in an amount to be proved at trial.

Count Three — Damages for Violation of State Law

35.

Plaintiff realleges and incorporates Paragraphs 1 through 34.

36.

The award of the electric service contract by Defendants Whitworth, Stovall, and Evans to Georgia Power, instead of Pataula EMC, constitutes a violation of the State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-81, and the procedures of the Georgia Vendor Manual.

37.

As a result of the actions of Defendants Stovall, Whitworth, and Evans, Pataula EMC has been damaged in an amount to be proved at trial.

38.

Pataula EMC is entitled to an award of damages against Defendants Stovall, Whitworth, and Evans individually in an amount to be proved at trial.

WHEREFORE, Pataula EMC requests a jury trial on the issues which can be determined by a jury and prays for the following relief:

1. That the Court preliminarily and permanently enjoin performance of the Department of Corrections-Georgia Power contract for electric service to the Calhoun County Prison;

2. That the Court rescind the Department of Corrections-Georgia Power contract for electric service for the Calhoun County Prison;

3. That the Court preliminarily and permanently award the contract for electric service for the Calhoun County Prison to Pataula EMC;

4. That Pataula EMC be awarded damages against Defendants Stovall, Whitworth, and Evans individually under Pataula EMC's § 1983 claim in an amount to be proved at trial;

5. That Pataula EMC be awarded damages under Pataula EMC's state law claim against Defendants Stovall, Whitworth, and Evans individually in an amount to be proved at trial;

6. That all costs of this action be charged against the Defendants;

7. That Pataula EMC be awarded its reasonable attorneys' fees as part of its costs, pursuant to 42 U.S.C.A. § 1988; and

8. That the Court grant such other and further relief as it deems just and proper.

/s/ James A. Orr
James A. Orr
State Bar No. 554608

/s/ Kathy R. Bess
Kathy R. Bess
State Bar No. 055760

PAUL, HASTINGS, JANOFSKY & WALKER
Forty-Second Floor
133 Peachtree Street, NE
Atlanta, Georgia 30303

EXHIBIT A

ROSSER FABRAP INTERNATIONAL
524 West Peachtree Street, N.W.
P.O. Box 54680
Atlanta, Georgia 30308-0680
(404) 876-3800

August 16, 1989

Mr. Robert May
GEORGIA DEPARTMENT OF CORRECTIONS
Facilities Development and Maintenance
2 Martin Luther King Drive
Room No. 756, East Tower
Atlanta, Georgia 30334

Re: DOR 53 Calhoun County C.I.
Blakely, Georgia
RFI No. 00015

Dear Mr. May:

As requested, we have reviewed the additional information received from your office as it pertains to the referenced project. The additional materials included rate increase history, energy rate schedules, and lease proposals for the on-site primary distribution system.

In our initial recommendation of May 24, 1989, Georgia Power Company provided a method of service considered better than that of the Pataula EMC, because it proposed the use of 2-46KV transmission level services to within 2225 feet and 1670 feet of the site. Pataula EMC, on the other hand, extended 12KV distribution lines from the existing Edison substation and a new 46KV/12KV substation at the Edison-Morgan transmission line. The two (2) feeds proposed by GPC originate from the same

Edison-Morgan transmission line, but separated by a manual switch.

Other major factors that effect [sic] the recommendation are as follows:

(1) *Operating Costs* — Present day rates show Pataula EMC to have an annual savings of $35,000 over GPC. Although this difference probably will not remain over the life of the project, it is a significant amount at this time.

(2) *Rate Increases* — Factors effecting [sic] the rate increases for both companies will have an impact in the future. Historically, GPC has had greater increases than have the EMC's. It appears that over the long period, the two utility companies will approach each other. From a cost perspective this issue is not the key one.

(3) *Leasing of an on-site primary system* — Since both submittals were not based on the same situation, it will be necessary to make certain assumptions and interpretations of the data presented.

   a. The cost of the capital expenditure is approximately the same; $248,000.00 for Pataula EMC and $234,847.00 for GPC. Both of these figures are estimates and not final lease costs. It was necessary to adjust both companies figures because GPC included the high mast lighting and Pataula EMC included the generator.

   b. The lease cost for GPC would be $4,700.00 per month for the life of the project with maintenance costs included. The lease can be bought out at any time.

c. For Pataula EMC, the lease is for 10 years with a monthly payment of $3,300.00. This includes maintenance during the term of the lease. At the end of the 10 year lease, the system becomes the property of the State for $1.00. At this time, a maintenance agreement would be needed if the EMC was to continue the up-keep on the system.

d. It was found that the lease agreements were based on a cost of capital of 9.5% for Pataula EMC and 16.44% for GPC.

e. The annual cost difference is $16,800.00 more for the GPC proposal during the first 10 years. Starting the 11th year and thereafter, the annual cost difference would be $57,600.00, less the maintenance agreement for Pataula EMC.

(4) *Intangible Factors* — GPC's proposal suggested the intention to provide training and technical seminars for DOC personnel. This is a benefit that is difficult to quantify.

Given the present day operating cost difference and lease cost issue, we recommend that Pataula EMC provide electrical service to the Calhoun County C.I. Along with this recommendation are a few suggestions that would improve the package or are essential to the design:

(1) The primary service from Pataula EMC would be made more reliable if it could extend its 46KV to the site before setting its two (2) 46KV/12KV substations.

(2) The 10 year lease from Pataula EMC and its maintenance agreement must incorporate the RFI system design; particularly the transformer specifications.

(3) Spare transformers and cable should be stocked as replacement equipment.

Should you have any questions, please do not hesitate to contact us.

Sincerely,

ROSSER FABRAP
INTERNATIONAL

/s/ Rich Wilinski
Rich Wilinski

RW/lkb

pc: Kerry Nickerson
File No. 1.1.3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
No. 1:90-CV-1675-JOF

PATAULA ELECTRIC MEMBERSHIP CORPORATION,

Plaintiff,

versus

BOBBY WHITWORTH, Individually and in his official capacity as Department of Corrections Commissioner, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of Department of Corrections, DAVID C. EVANS, Individually, and GEORGIA POWER COMPANY,

Defendants.

VERIFICATION

Personally appeared before the undersigned officer, Gary W. Wyatt, who states upon oath that he is the General Manager of Pataula EMC, and states that the facts set forth in the foregoing amended complaint are true and accurate to the best of his knowledge and belief.

This 31st day August, 1990.

/s/ Gary W. Wyatt
Gary W. Wyatt

Sworn to and subscribed before me,
this 31st day of August, 1990

/s/
Notary Public

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the within and foregoing AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DAMAGES by placing a copy of same in the United States mail in a properly addressed envelope with adequate postage affixed thereon to ensure delivery to:

Robert P. Edwards, Jr. Esq.
Troutman, Sanders, Lockerman
& Ashmore
1400 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

William F. Amideo
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 7th day of September, 1990.

/s/ James A. Orr
James A. Orr

FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 91-2081
No. 92-19

In the Supreme Court of the United States of America

October Term, 1992

GEORGIA POWER COMPANY,
and
BOBBY K. WHITWORTH, CLYDE STOVALL,
and DAVID C. EVANS

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION
and
FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

PAUL, HASTINGS JANOFSKY
& WALKER
Forty-Second Floor
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133 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 588-9900

James A. Orr
Counsel of Record
Kathy R. Bess

Counsel for Respondents

201 Blakely Street
Cuthbert, Georgia 31740
(912) 732-3470

James E. Friese

Counsel for Respondent
Pataula Electric
Membership Corporation

QUESTIONS PRESENTED

1. Whether a lowest responsible bidder who has a property interest in award of the contract under state law can bring a claim for deprivation of its property interest under 42 U.S.C. § 1983?

2. Whether the Eleventh Circuit properly refused to grant qualified immunity to state officials where the court found that the officials refused to comply with Georgia legal directives of which they knew or should have known?

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No. 91-2081
No. 92-19

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1992

GEORGIA POWER COMPANY,
and
BOBBY K. WHITWORTH, CLYDE STOVALL
and DAVID C. EVANS

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION
and FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondents Pataula Electric Membership Corporation ("Pataula EMC") and Flint Electric Membership Corporation

("Flint EMC") (collectively "Respondents")[1/] hereby submit their Brief in Opposition to the Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed by Georgia Power Company ("Georgia Power") and Department of Corrections officials Bobby Whitworth, Clyde Stovall and David Evans. For the reasons set forth herein, Respondents respectfully pray that this Court deny the Petitions for Writ of Certiorari.

STATEMENT OF THE CASE

This dispute arises out of the Georgia Department of Corrections' ("DOC") selection of Georgia Power over Flint EMC and Pataula EMC as electric suppliers for two new prisons, even though the Respondents were the lowest responsible bidders for the utility contracts for the prisons.

In 1989, the DOC decided to build a new prison in Calhoun County, Georgia. Pataula EMC's Amended Complaint (Georgia Power's Appendix at 165a-166a).[2/] Thereafter, the

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1/ All parties to the proceedings below are identified in the caption of Respondents' Brief In Opposition to the Petitions for Writ of Certiorari. *See* Supreme Court Rule 14.1(b). Respondents do not have any parent companies or subsidiaries. A party with an interest in this litigation, however, is Oglethorpe Power Corporation ("Oglethorpe"). Oglethorpe was formed by its 39 electric cooperative members, including Flint EMC and Pataula EMC, to supply their generation and transmission needs. *See* Supreme Court Rule 29.1.

2/ Respondents will hereinafter refer to Georgia Power's Appendix as follows: "(App. at ____a)."

DOC received bids from Pataula EMC and Georgia Power for the provision of electric service to the prison. (App. at 166a). Pataula EMC's proposal for electric service constituted the lowest responsible bid, being substantially lower in both cost per kilowatt hour and estimated annual operating cost. (App. at 166a). Under Pataula EMC's bid, the electric bill for the Calhoun County Prison would be approximately $35,000 less during the first year of operation than under Georgia Power's bid. (App. at 166a). Additionally, Pataula EMC's bid would save the DOC at least $16,800 a year in equipment leasing costs during the first ten years and at least $57,600 a year thereafter. (App. at 166a).

As part of its process of evaluating the proposals to supply electricity to Calhoun County Prison, the DOC asked consulting engineers Rosser Fabrap International ("Rosser Fabrap") to review the proposals submitted by Georgia Power and Pataula EMC. (App. at 167a). After reviewing the proposals, Rosser Fabrap recommended Pataula EMC because of its lower operating costs and lower lease costs. *See* Exhibit A to Pataula EMC's Amended Complaint (App. at 174a-177a). Despite Pataula EMC's lower bid and Rosser Fabrap's recommendation, DOC officials Whitworth, Stovall and

Evans[3/] ("DOC Officials") awarded the contract for electric service to the prison to Georgia Power. (App. at 167a).

Another bidding opportunity for a prison arose in 1990 when the DOC approved construction of a prison in Macon County, Georgia. Flint EMC's Amended Complaint. (App. at 138a). Georgia Power and Flint EMC submitted bids for electric service to the prison, and once again the EMC was the lowest responsible bidder for the contract. (App. at 138a-139a). The estimated cost under Flint EMC's bid was approximately $35,000 less during the first year of operation than under Georgia Power's bid. (App. at 139a).

The DOC again turned to consulting engineers Rosser Fabrap to review the proposals from Georgia Power and Flint EMC. (App. at 139a). After reviewing the proposals, Rosser Fabrap recommended Flint EMC because of its lower operating costs and superior service. *See* Exhibit A to Flint EMC's Amended Complaint (App. at 147a-152a). The DOC Officials again ignored the cost savings to Georgia taxpayers and awarded Georgia Power the contract for electric service for the Macon County Prison. (App. at 139a-140).

3/ Pataula EMC's Complaint names David C. Evans as a defendant because Mr. Evans was Commissioner of the DOC when Pataula EMC and Georgia Power submitted bids to the DOC for the electric utility contract at issue. Mr. Evans, however, had resigned as commissioner before Flint EMC sought to obtain the contract at issue in Flint EMC's Complaint. Therefore, Flint EMC did not name Mr. Evans as a defendant.

The Respondents filed separate complaints challenging the DOC Officials' unlawful award of electric utility contracts to Georgia Power. In their complaints, as amended, the Respondents contend that Georgia procurement statutes and regulations require the DOC Officials to award the utility contracts to the lowest responsible bidder. (App. at 138a, 166a). *See* O.C.G.A. § 50-5-51(1) (1990); Georgia Vendor Manual, Art. VIII, § 3 (App. at 62a, 107a). In such situations, Georgia law recognizes that the lowest responsible bidder has a legal entitlement or property interest in award of the contracts. *See Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 538, 266 S.E.2d 157, 161 (1980). The DOC Officials' refusal to award the utility contracts to the Respondents, the lowest responsible bidders, has deprived the Respondents of their property interest, legally protected by 42 U.S.C. § 1983 (1988). (App. at 141a-143a; 168a-170a). The Respondents seek injunctive and monetary relief for the DOC Officials' deprivation of the Respondents' property interest. (App. at 141a-144a, 168a-171a). The Respondents also seek damages based on the DOC Officials' violations of the State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-81 (1990 & Supp. 1992), and the procedures of the Georgia Vendor Manual. (App. at 144a-146a, 171a-173a).

Georgia Power and the DOC Officials moved to dismiss the Respondents' amended complaints for failure to state a

claim for which relief might be granted (Fed. R. Civ. P. 12(b)(6)). The DOC Officials also requested dismissal on the basis of the defense of qualified immunity.

The District Court for the Northern District of Georgia, Judge Horace T. Ward, consolidated the two cases for pre-trial proceedings and granted Georgia Power's and the DOC Officials' motions to dismiss the consolidated cases. Order of the Court dated November 20, 1990 (App. at 21a-30a). The District Court held that under Georgia law a disappointed bidder may possess a constitutionally protected property interest in award of a contract with the state. However, the District Court found that unlike other state purchases, electric utility contracts were not governed by Georgia's bidding laws. On that basis, the District Court concluded that the Respondents had not demonstrated a property interest in award of the contracts. The Respondents appealed to the Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit reversed and remanded. *Pataula Elec. Membership Corp. v. Whitworth*, 951 F.2d 1238 (11th Cir. 1992) (App. at 1a-12a). The Eleventh Circuit interpreted Georgia law as requiring that electric utility contracts, like other state purchases, be awarded to the lowest responsible bidder. Accordingly, the Eleventh Circuit ruled that Respondents have a property interest in award of the utility contracts at issue, and Respondents have stated a claim under

42 U.S.C. § 1983 for deprivation of that interest. *Id.* at 1242. The Eleventh Circuit also refused to grant the DOC Officials qualified immunity. *Id.* at 1244.

REASONS FOR DENYING THE PETITIONS FOR WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE A FINAL DECREE HAS NOT BEEN ISSUED IN THIS CASE.

The Petitions for Writ of Certiorari of Georgia Power and the DOC Officials (collectively "Petitioners") should be denied because a final decision has not been rendered in the case. This Court has emphasized that certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted). The lack of finality in the underlying case may "of itself alone" serve as grounds for denial of certiorari. *Id. See also Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (Supreme Court denied certiorari "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court.").

The Supreme Court's refusal to accept certiorari until a final decree has been entered serves important purposes. First, waiting until final resolution of the case promotes judicial

efficiency by allowing all claims relevant to a case to be presented in a single petition. Second, the Supreme Court may be relieved from addressing important constitutional questions, depending on the final resolution of the case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) ("The Court will 'not anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). Accordingly, the Petitions of Georgia Power and the DOC Officials, sought well before a final decree in the case, should be denied.

II. FEDERAL COURT DECISIONS DO NOT CONFLICT AS TO SECTION 1983 DISAPPOINTED BIDDER CLAIMS.

Georgia Power contends that certiorari should be granted because "there is a great deal of confusion in the lower federal courts" regarding a section 1983 challenge by an unsuccessful applicant or bidder for a state contract. Georgia Power's Petition for Writ of Certiorari, p. 9 ("Georgia Power's Petition"). The starting point for analysis of a section 1983 claim by a disappointed bidder is this Court's description of a property interest in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

> [Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent

> source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

In the cases cited by Georgia Power in pp. 9-10 of its Petition, the federal courts undertook the analysis of a property interest described in *Roth*. After examining the applicable state statutes and regulations, certain of the courts determined that the applicable state law did not create any property interest or entitlement in award of a contract. *See, e.g., Peterson Enters., Inc. v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, No. 89-3347 (6th Cir. Nov. 29, 1989) (1989 U.S. App. LEXIS 17818) (Ohio state law did not create in a bidder a legitimate claim of entitlement to award of the contract.); *Curtis Ambulance, Inc. v. Board of County Comm'rs*, 811 F.2d 1371 (10th Cir. 1987) (Applicable Kansas law did not give the bidder a constitutionally protected property interest in award of the contact.); *Sowell's Meats & Servs., Inc. v. McSwain*, 788 F.2d 226 (4th Cir. 1986) (South Carolina law did not confer a property interest on unsuccessful bidders for public contracts.); *Coyne-Delany Co. v. Capital Dev. Bd.*, 616 F.2d 341 (7th Cir. 1980) (A potential supplier had no property interest under Illinois law in having its product purchased or specified.); *Ara Servs., Inc. v. School Dist.*, 590 F. Supp. 622 (E.D. Pa. 1984) (Applicable Pennsylvania law did not grant a

bidder any legitimate claim of entitlement to award of a public contract.); *City of Atlanta v. Ashland-Warren, Inc.*, No. C81-106a (N.D. Ga. Aug. 20, 1981) (LEXIS, Genfed library, Dist. file) (Federal law did not vest a bidder with a property interest in award of a contract.); *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F. Supp. 625 (E.D. Pa. 1980) (Under Pennsylvania law, a disappointed bidder does not have a property interest in award of the contract because the requirement that a contract be awarded to the lowest responsible bidder is solely for the protection of the taxpayers.). *Cf. Estey Corp. v. Matzke*, 431 F. Supp. 468 (N.D. Ill. 1976) (District court did not examine Illinois law to determine if state law created a property interest, and court held, without discussion, that a property interest may not be vindicated under 42 U.S.C. § 1983.).

Other courts, after examining the applicable state law, have found that state law created a property interest in the lowest responsible bidder. *See, e.g., L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985); (Arkansas law created a protected property interest in the lowest responsible bidder if its bid complied with bid specifications.); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981) (Pennsylvania statutory provisions created a property interest in award of a cable franchise for the lowest responsible bidder.); *Kendrick v. City Council*, 516 F.

Supp. 1134 (S.D. Ga. 1981) (Georgia municipal regulations could create a property interest in a bidder, but the bidder must allege facts sufficient to state a claim for deprivation of his property interest.); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980) (Pennsylvania law vested in the lowest responsible bidder a property interest in award of the cable television contract.).

The federal court decisions cited by Georgia Power do not conflict simply because federal courts are interpreting different state laws and finding that some statutory provisions create a property interest while other statutes do not. This Court should not grant certiorari simply to parse Georgia competitive bidding statutes and regulations to determine whether these provisions create a property interest.

III. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE LOWER COURTS' INTERPRETATION OF GEORGIA STATUTES AND REGULATIONS.

In its Petition for Writ of Certiorari, Georgia Power fails accurately to characterize what Respondents are seeking in the underlying action. Respondents claim a property interest in award of the utility contracts at issue pursuant to Georgia's competitive bidding statutes and regulations. Georgia Supreme Court decisions have recognized that the lowest responsible bidder for a state contract may have a property interest in award of that contract. *See Hilton Constr. Co. v. Rockdale*

County Bd. of Educ., 245 Ga. 533, 266 S.E.2d 157 (1980); *City of Atlanta v. J. A. Jones Constr. Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990) (Georgia Supreme Court recognized that an injured bidder has a cause of action for failure to obtain the bid, but the bidder's damages are limited to bid preparation costs), *cert. denied*, 111 S. Ct. 2042 (1991).

While emphasizing the competitive nature of the process, Georgia Power ignores the entitlement created by Georgia law. Georgia statutes and regulations mandate that state contracts shall be awarded to the lowest responsible bidder.[4/] An entitlement to award of the contract arises under the mandatory language of the Georgia competitive bidding provisions. In this case, the Eleventh Circuit found that Georgia's statutes and regulations dictate that electric utility contracts shall be awarded to the lowest responsible bidder.[5/]

4/ The applicable Georgia competitive bidding provisions do not simply prohibit awards to "insiders or friends of State officials," as contended by Georgia Power. *See* Georgia Power's Petition p. 15. Further, the state of Georgia's decision to require contracts to be awarded to the lowest responsible bidder is a sound policy in times of runaway budget deficits.

5/ The Georgia competitive bidding provisions permit a state official to reject any and all bids. *See* O.C.G.A. § 50-5-67(b) (Supp. 1992). Thus, a state official can solicit bids and then decide not to contract for a specific purchase. Nevertheless, once a state official decides to award a contract, the official must follow competitive bidding requirements and award the contract to the lowest responsible bidder. *See* O.C.G.A. § 50-5-67(b) (Supp. 1992); Georgia Vendor Manual, Art. VIII, § 3. (App. at 72a, 107a). *See also, Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101 (N.D. Ga. 1990).

Georgia Power conveniently fails to cite a section of the Attorney General's opinion which confirms the mandatory nature of the competitive process in Georgia:

> [O]nce DOAS [Department of Administrative Services] has considered all relevant factors, it must award the contract to the lowest bidder meeting its standards. DOAS may not award a contract to a higher bidder if the products are equal in view of all relevant factors.

Op. Ga. Att'y Gen. 74-16, at 30 (1974). (App. at 133a). Thus, Georgia's competitive bidding requirements create for Respondents a property interest in award of the contracts.

The Eleventh Circuit did not, as Georgia Power contends, find that the "presence of criteria to guide state officials was sufficient to give rise to an entitlement." Georgia Power's Petition, p. 14. The Eleventh Circuit found that certain objective factors to be considered under Georgia law in choosing a lowest responsible bidder did not negate the mandatory language of Georgia's competitive bidding provisions.[6/] *Pataula*, 951 F.2d at 1242-43. (App. at 8a-9a).

6/ Under O.C.G.A. § 50-5-67(b) (Supp. 1992) and the Georgia Vendor Manual, Art. VIII, §3, the DOC Officials must consider certain objective factors such as price, performance and capacity to perform of the bidder, quality of merchandise offered, transportation charges and date of delivery.

Moreover, where discretion is granted, it cannot be abused by the state official. *Id.* at 1243. (App. at 11a).[7/]

The District Court's dismissal of Respondents' claims and the Court of Appeals' reversal turned on an interpretation of Georgia's state purchasing laws. The District Court found that those laws did not apply to electric utility contracts; the Eleventh Circuit disagreed and reversed. An interpretation of state statutes and regulations is not an "extraordinary" issue warranting Supreme Court review. The Supreme Court should not grant certiorari to duplicate the Eleventh Circuit's analysis of state statutes and regulations.

IV. THE SUPREME COURT HAS NOT RULED THAT POSSESSION IS REQUIRED FOR THE CREATION OF A PROPERTY INTEREST.

Georgia Power contends that an entitlement pursuant to state statutes and regulations only arises after a person has acquired or possesses the specific benefits. Georgia Power's Petition, p. 8. The Supreme Court has refused to adopt this limitation on due process rights. In *Board of Pardons v. Allen*, 482 U.S. 369, 374-75 (1987), this Court ruled that an applicant for parole may have a liberty interest in parole

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7/ *Cf. Regents of University of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (Supreme Court upheld district court's evidentiary finding that the University did not act arbitrarily in dropping Ewing from medical school program).

release, depending on the parole rules and regulations. The Montana parole statute in *Allen* used "mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id.* at 377-78, (quoting *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979) (footnote omitted). This Court found that the Respondents had a liberty interest in or entitlement to parole release pursuant to the mandatory language of the Montana statute, even though the Respondents had not acquired or possessed parole or its benefits. 482 U.S. at 381. *See also Greenholtz*, 442 U.S. at 12 (expectancy of parole release provided in Nebraska's parole statute was entitled to some measure of constitutional protection).

The same reasoning that applies to a liberty interest in a parole release would also apply to a property interest in award of a contract. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("This analysis as to liberty parallels the accepted due process analysis as to property.") Thus, possession should not be required to create a property interest.

Furthermore, the Respondents' claim is not based on the contention that the state officials could have made a better decision. The limited judicial question considered by the Eleventh Circuit was whether Respondents stated a claim based on a violation of mandatory provisions of state law. This

question is entirely consistent with other § 1983 decisions and will not give rise to a legion of cases in which federal courts are second-guessing state officials, as contended by Georgia Power.

V. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER A SUBSTANTIVE DUE PROCESS ARGUMENT NOT RAISED IN THE COURT OF APPEALS.

Georgia Power raises for the first time the argument that the deprivation of Respondents' property interest does not rise to the level of a constitutional violation. Georgia Power did not raise this argument before the Eleventh Circuit, and this argument should not serve as a basis for granting certiorari. *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783 n.14 (1980) ("[W]e would not normally allow a party to make an argument it had not raised below . . . .").

Georgia Power bases its substantive due process argument on a First Circuit decision, *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 112 S. Ct. 1151 (1992). In the *PFZ* case, a real estate developer was denied a construction permit by a state agency in Puerto Rico. The developer brought a section 1983 action, alleging that the agency's continued refusal to grant its permit deprived the developer of its procedural and substantive due process rights. Under First Circuit precedent, rejections of development

permits did not implicate substantive due process law. Georgia and Eleventh Circuit decisions, however, have not reached the same conclusion as to a property interest in award of a contract. *See Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980); *Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101 (N.D. Ga. 1990).

Moreover, the First Circuit does not reference any mandatory guidelines which required the permit to be granted. The case appears to be a typical permit situation, with no requirement that the agency "shall issue" a permit to the applicant. In contrast, the DOC Officials were required by Georgia statutes and regulations to award the electric utility contracts to the lowest responsible bidders. Thus, the *PFZ* decision is not applicable to the issues in this case.

VI. THE ELEVENTH CIRCUIT PROPERLY DENIED THE DOC OFFICIALS' CLAIM OF QUALIFIED IMMUNITY.

The DOC Officials ask this Court to grant certiorari to review the Eleventh Circuit's refusal to dismiss, on grounds of qualified immunity, the damages claims against the DOC Officials in their individual capacities.[8/] The Eleventh Circuit's

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8/ The qualified immunity defense only protects a defendant from damages claims against the defendant in his individual capacity. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.34 (1982). Thus, qualified immunity is not a defense to the Respondents' claims for injunctive relief against

(continued...)

analysis of the application of qualified immunity complies with federal precedent. The Eleventh Circuit evaluated the actions of the DOC Officials under a reasonable person standard. "[G]overnment officials . . . generally are shielded [by the doctrine of qualified immunity] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[9] *See also Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (defense of qualified immunity turns on objective legal reasonableness of action).

The Eleventh Circuit found that the State of Georgia's competitive bidding statutes and regulations clearly mandate that procurers such as the DOC Officials must award contracts to lowest responsible bidders whenever possible. (App. at 12a). The DOC Officials obtained competitive bids from Respondents and Georgia Power, but the DOC Officials refused to award the contracts to Respondents, the lowest responsible

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8/(...continued)
the DOC Officials. The DOC Officials in their Petition for Writ of Certiorari fail to acknowledge this distinction.

9/ The DOC Officials incorrectly contend that the law is not clearly established for qualified immunity purposes unless previously decided by the Supreme Court or the Eleventh Circuit. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (For a qualified immunity defense to apply it must be shown that "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or . . . the law clearly proscribed the actions the defendant . . . took.").

bidders. Since 1980, the Georgia Supreme Court has recognized that a lowest responsible bidder has a constitutionally protected property interest in award of a contract under Georgia competitive bidding statutes and regulations. (App. at 12a). *See Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980). The Eleventh Circuit concluded that the DOC Officials, by ignoring statutory and regulatory competitive bidding directives, knew or should have known that they deprived the Respondents, as lowest responsible bidders, of a property interest.

This case does not merit certiorari simply to have the United States Supreme Court substitute its analysis of the defense of qualified immunity under the facts of this case for that of the Eleventh Circuit. Further, analysis of the defense is not of such national importance to warrant review by the Supreme Court.

The DOC Officials misconstrue the holding in *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986). In that case, the Supreme Court noted that a magistrate is more qualified than a police officer in making a probable cause determination for issuing a warrant. *Id.* If the magistrate issues a warrant, when no officer of reasonable competence would issue the warrant, the magistrate's action is "an unacceptable error indicating gross incompetence or neglect of duty." *Id.*

Nevertheless, a police officer must exercise his own reasonable professional judgment when seeking the warrant. An officer cannot rely on the greater incompetence of the magistrate to excuse his own conduct. Thus, the defense of qualified immunity applies only if the officer's own actions do not satisfy a standard of objective reasonableness.

This holding does not translate into a general rule that a state official is protected by qualified immunity for his illegal actions if a judge or magistrate makes an erroneous ruling. The actions of the DOC officials alone must be judged against the standard of objective reasonableness. The Eleventh Circuit's evaluation of the DOC Officials' actions do not warrant a writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Georgia Power's and the DOC Defendants' Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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GEORGIA POWER COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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GEORGIA POWER COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

This reply will address *seriatim* the contentions raised in Respondents' Brief in Opposition with respect to Georgia Power Company's (hereinafter "Georgia Power") Petition for Writ of Certiorari (hereinafter "Petition").

I.

This Court Should Exercise Its Discretion And Grant Certiorari To Review The Decision Below.

Respondents' contention that this Court should deny certiorari because no final decree has been issued and therefore the Court should be "relieved from addressing important constitutional questions" is without merit. [See Respondents' Brief in Opposition, at 8.] The present action was properly in the Eleventh Circuit on Respondents' appeal from the district court's grant of Georgia Power Company's and the State Defendants' motions to dismiss. Thus, this Court has jurisdiction to issue certiorari pursuant to 28 U.S.C. § 1254(1). *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Further, this case presents the elements that are paramount to this Court's consideration of petitions for certiorari. The United States Court of Appeals for the Eleventh Circuit issued a decision that is in conflict with the decisions of other United States Courts of Appeals and decided an important question of federal law that has not been, but should be, settled by this Court. [See discussion at pages 3 and 4 of this Reply Brief.] Contrary to Respondents' assertion, resolving the conflict between the circuit courts illustrated by the Eleventh Circuit's decision will promote judicial efficiency and economy by resolving an issue of widespread public importance. Because the issues impli-

cated in this case have been fully analyzed by the lower federal courts, there is no benefit to postponing consideration of the essential question presented. Therefore, this Court should exercise its discretion under Supreme Court Rule 10.1(a) and (c) and grant a writ of certiorari to review the decision below.

II.

Federal Court Decisions Conflict Over The Scope of Section 1983 And The Application Of *Roth* To Disappointed Bidder Lawsuits.

Respondents argue there is no conflict regarding the application of *Board of Regents v. Roth,* 408 U.S. 564 (1972), among the circuits because every court in disappointed bidder cases referenced state law in its decision. [See Respondents' Brief in Opposition, at 9-10.] A review of the full text of the cases cited in Georgia Power's Petition at pages 9 and 10 demonstrates, however, that several federal courts do not believe that *Roth* is applicable to the disappointed bidder and procurement situation. Due to conflict and confusion over the application of *Roth*, however, these courts wisely go on to rule alternatively that even if *Roth* applies, an entitlement nonetheless did not arise under the relevant state law. For example, the Seventh Circuit stated in *Coyne-Delany Co. v. Capital Development Board*, 616 F.2d 341, 343 (7th Cir. 1980) (emphasis added):

> The rational of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), is, in our opinion, *inapplicable to the procurement situation;* but even if it were, plaintiff has failed to show either a property or a liberty interest entitled to procedural due process protection.

Further, in discussing the application of *Roth* to public contracts in general, the Second Circuit stated:

> Nevertheless, the doctrinal implications of constitutionalizing all public contract rights would raise substantial concerns, and we seriously doubt that *Roth* and its progeny portend such a result, although we do not reach the issue today. *An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as "property" entitled to procedural due process protection.* . . . But we hesitate to extend the doctrine further to constitutionalize interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor.

S & D Maintenance Co. v. Goldin, 844 F.2d 962, 966 (2d Cir. 1988) (emphasis added). Recently, the Second Circuit also stated:

> While state law defines the underlying substantive interest, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978) (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709). *In particular, not every contractual benefit rises to the level of a constitutionally protected property interest.*

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 782 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 657 (1991) (emphasis added); *see also Metric Constructors, Inc. v. Gwinnett County, Georgia*, 729 F. Supp. 101, 101 (N.D. Ga. 1990) (noting "widely conflicting authority

concerning the rights of a disappointed bidder to obtain judicial relief").

Moreover, the conflict and confusion in the courts extends beyond the application of *Roth* to the broader question of the proper scope of 42 U.S.C. § 1983. For example, in *Kasom v. City of Sterling Heights*, the district court ruled that "bidders have a *limited* property interest in not having the procedure, which regulates the enjoyment of the benefit sought, applied in an arbitrary or capricious manner." 600 F. Supp. 1555, 1559 (E.D. Mich. 1985) (emphasis in original). This ruling is in sharp contrast to the view held by the district court in *Blake v. Ambach*, which stated: "Section 1983 is not a means for litigating in a federal forum whether a state or local administrative decision was wrong or even whether it was arbitrary and capricious." 691 F. Supp. 651, 655 (S.D.N.Y. 1988) (citing *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982)). Further, even with respect to situations involving already acquired government contracts, several circuits have limited the application of *Roth* and the use of Section 1983 as a vehicle for obtaining judicial review in federal court of contract disputes a party has with a municipal or state government. *See, e.g., San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408 (9th Cir. 1987) ("It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim."); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) ("A contract dispute, however, does not give rise to a cause of action under section 1983.").

Interestingly, the Eleventh Circuit did not cite any other circuit case dealing with frustrated bidders as support for its holding. The sampling of cases Georgia Power quoted above from the Second, Seventh, and Ninth

Circuits reveal the circuits are struggling with the application of *Roth*, and are seeking a framework for confining lawsuits by entities or individuals frustrated with their business interactions with their state or municipal governments.

III.

Certiorari Should Be Granted To Resolve Conflict And Confusion In The Lower Federal Courts Regarding The Application Of *Roth* To Disappointed Bidder Lawsuits.

Respondents claim that Georgia Power fails to accurately characterize what Respondents are seeking, arguing that what they claim is a property interest in the *award* of the utility contracts. [Respondents' Brief in Opposition, at 11 (emphasis in original).] Georgia Power contends that the award is inherently inchoate, and as such, a bidder does not know if it will receive the contract until the award is made. A bidder cannot form a legitimate expectation of receiving a state contract in Georgia for multiple reasons including, as Respondents admit, "Georgia competitive bidding provisions permit a state official to reject any and all bids." [Respondents' Brief in Opposition, at 12 n.5, citing O.C.G.A. § 50-5-67(b) (Michie Supp. 1992).]

By arguing that certiorari should not be granted to review the Eleventh Circuit's interpretation of Georgia law, Respondents sidestep the contention of Georgia Power that this case involves a fundamental question of whether *Roth* and its progeny are applicable in any instance to frustrated bidder claims. Thus, the primary legal issue in this appeal revolves around *Roth* and not Georgia law. *See, e.g., Ezekwo*, 940 F.2d at 782. Only if *Roth* is applicable to frustrated bidder claims is Georgia law at issue.

Certiorari, however, would be proper in this case even if Georgia law is at issue because of the Eleventh Circuit's unreasonable interpretation of Georgia law. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (listing cases where "the Court has refused to follow the views of a lower federal court on an issue of state law"). The Eleventh Circuit's error of confusing state law that grants *standing* to obtain judicial review with law that grants substantive property rights is a significant error independently demanding this Court's review because the distinction between standing and property entitlement is fundamental to a proper application of Section 1983 under *Roth*.

In its opinion, the Eleventh Circuit did not discuss, much less cite *City of Atlanta v. J.A. Jones Construction Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990), which is the latest treatment by the Supreme Court of Georgia of disappointed bidder suits. *J.A. Jones* identifies that under Georgia law, Respondents lack the property interest they claim. [See Petition, at 12 n.6.] Instead of looking to *J.A. Jones* for guidance, the Eleventh Circuit relied upon *Hilton Construction Co. v. Rockdale County Board of Education*, 245 Ga. 533, 266 S.E.2d 157 (1980), to support its ruling that Georgia recognized a property interest in the award of state contracts to state bidders. *See Pataula Electric Membership Corp. v. Whitworth*, 951 F.2d 1238, 1243 (11th Cir. 1992) [App. at 10a]. The Supreme Court of Georgia in *Hilton*, however, only addressed the question of whether a disappointed bidder had standing to sue the State Board of Education, applying the zone of interests test that was articulated in *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). *Hilton*, 245 Ga. at 538, 266 S.E.2d at 161. The zone of interests test, however, determines only the potential class of plaintiffs. *See Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987). The question of standing is a much different question than that of whether a person

has a property interest in doing business with the government. *See Bank of Jackson v. Cherry*, ____ F.2d ____, No. 91-3547, *slip op.* at 3231, 1992 U.S. App. LEXIS 16812 (11th Cir. July 27, 1992) (in distinguishing *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), the court stated: "But *Freeman* held no more than that debarment works a sufficient economic injury on the plaintiff to confer standing. 334 F.2d at 574-75. It did not hold that the plaintiff in that case held a property interest in doing business with the government."). In *Hilton*, the Supreme Court of Georgia, although finding the plaintiff had standing to bring suit, made no determination as to whether the plaintiff had an interest in the contract sought in the nature of a property entitlement identified in *Roth*.

Respondents never acquired a Georgia property benefit to be deprived of, and therefore the Eleventh Circuit erred in employing *Roth* to involve itself and the United States Constitution in the dispute Respondents have with their state government. Moreover, once finding federal judicial review proper, the Eleventh Circuit again erred in its interpretation of Georgia law, reversing the district court. The court confused standing law with substantive property interest law and the Eleventh Circuit panel did not address the most recent pronouncement of the Supreme Court of Georgia dealing with disappointed bidder lawsuits.

IV.

The Fourteenth Amendment's Procedural Protection Of Property Is A Safeguard Of The Security Of Interests That A Person Has Already Acquired In Specific Benefits.

Respondents argue that this Court has not ruled that possession is required for the creation of a property interest. Georgia Power fully acknowledges that the Court has not addressed squarely the issue of possession.

[See Petition, at 10 n.5.] However, *Roth's* "already acquired" requirement and the property concept itself demonstrate that the Court has implicitly ruled possession is fundamental to the formation of a constitutionally protected property interest. *See* J. Nowak, R. Rotunda, & J.N. Young, *Constitutional Law*, 547 n.8 (2d ed. 1983) ("present enjoyment" concept is implied by statements of the Court) (hereinafter "Nowak, Rotunda & Young"). This case presents an excellent opportunity for the Court to address the issue of possession because it involves only the limited and precise legal question of whether possession is fundamental to the formation of a constitutionally protected property interest.

In response to Georgia Power's Petition, Respondents' attempt to deflect the Court's attention away from *Roth* and instead base their arguments on liberty interest cases, specifically *Board of Pardons v. Allen*, 482 U.S. 369 (1987) and *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). [See Respondents' Brief in Opposition, at 14-15.] These cases, however, do not assist Respondents' claims. First, liberty interests are broader than property interests. *See Bank of Jackson v. Cherry, slip op.* at 3232. Second, *Pardons* is based on *Greenholtz*, and *Greenholtz* identifies that there is a difference in the status between applicants for benefits and those already receiving government benefits. *See Greenholtz*, 442 U.S. at 9-11. *See generally* Nowak, Rotunda & Young, at 538 ("Thus, the majority [in *Greenholtz*] distinguished its earlier application of due process principles to parole and probation revocations because those determinations involved termination, upon a finding of specific facts, of a state-granted, *presently enjoyed*, conditional liberty interest." (emphasis added)).

The case at bar turns upon *Roth*. In *Roth* the Court expanded the range of interests that could be considered "property", but these new property interests, such as drivers licenses, take on the protections afforded to estab-

lished types of property because they have the traditional indicia of property, particularly, possession. Indeed, as previously noted in Georgia Power's Petition at page 9, Justice O'Connor observed that the Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986). In the case at bar, Respondents' claims lack the attributes of property.

V.

The Court Should Grant Certiorari To Review The Eleventh Circuit's Inauguration Of Substantive Due Process Rights To Disappointed Bidders.

In the Eleventh Circuit, Georgia Power argued that Respondents' interest in the award of a contract was inherently inchoate, and as such, could not form the basis of a *Roth* entitlement. Georgia Power emphasized that this was especially true in the case at bar because the State Defendants could reject any and all bids; consequently, no bidder could be sure that any bid would ever be accepted. Confronted with this argument, the Eleventh Circuit ruled "plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements." *Pataula*, 951 F.2d at 1243 [App. at 11a.] It is the Eleventh Circuit opinion that Georgia Power is appealing. With this ruling, the Eleventh Circuit ignored this Court's guidance in the area of substantive due process analysis and created a further split among the circuits. [See Petition, at 17-20.]

CONCLUSION

The State Defendants' decision to select one Georgia electric utility over another Georgia utility to supply power to two prisons should not be a concern of the federal courts. The Eleventh Circuit erred in reversing the district court and in so doing, the Eleventh Circuit handed down a decision that flies in the face of this Court's precedents, conflicts with several other circuits, and although Georgia law is not at issue on this appeal, is an erroneous interpretation of Georgia law.

Respectfully submitted,

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